





A TREATISE

UPON SOME OF THE

GENERAL PRINCIPLES OF THE LAW,

WHETHER OF A

LEGAL, OR OF AN EQUITABLE NATURE,

INCLUDING THEIR

RELATIONS AND APPLICATION

TO

ACTIONS AND DEFENSES

IN GENERAL,

WHETHER IN

COURTS OF COMMON LAW, OR COURTS OF EQUITY;

AND EQUALLY ADAPTED TO

COURTS GOVERNED BY CODES.

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VOLUME VII.

ALBANY:
WILLIAM GOULD, JR., & CO.,
LAW BOOKSELLERS AND PUBLISHERS.
1885.

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1885

Entered, according to act of Congress, in the year eighteen hundred and seventy-nine,
By WILLIAM WAIT,
In the office of the Librarian of Congress, at Washington.

WEED, PARSONS AND COMPANY,
PRINTERS AND ELECTROTYPERS,
ALBANY, N. Y.

PREFACE.

In completing this work it is deemed proper to add a few words to what was said in the preface contained in the first volume. A very cursory examination of the work will show that it was not designed to occupy the ground of any mere general commentary on the law. If a work like Kent's Commentaries be taken as a good example of such a work as that, it will readily be seen that it contains much matter that is not needed in a work like the present, and, besides, that it omits much or most of what constitutes the chief value of the present work.

The general idea or principle attempted to be carried out in this work was, to present the general rules of actions at law, whether founded upon contracts or upon torts, to illustrate the principles of suits in equity, and the relief that may be obtained, and to furnish the general grounds of defense available, whether in legal actions or in equitable suits.

In prosecuting actions, or in conducting defenses, it will be found that besides the information usually given in works relating to the subject of actions or defenses, there is usually much other general information that is very valuable in determining the proceeding in the matter in hand. If the action is one founded upon contract, it is quite essential that the general principles of contract should be observed. So, if the action has its origin in a tort, the rules of law upon that subject must be regarded. Again, in the varied subjects of litigation, it is found that actions founded upon contracts have to be examined in reference to some general title of the law. Not only is it necessary to be familiar with the *general principles* relating to contracts

or torts, but it is equally important to know the rules which govern in particular instances. And, therefore, this work includes such titles as Agency, Animals, Banks and Banking, Bills and Notes, Bonds and a vast number of other titles, alphabetically arranged, for the purpose of discussion and presentation.

From this brief statement the reader will apply this general rule to the entire work, and he will see that the object in view has been to give the greatest amount of information applicable to actions or defenses.

In writing the work, uniformity in the size of the volumes has been observed as far as practicable. But, in completing the work, it was impossible to anticipate the exact amount or extent of each chapter, and, therefore, to make certain that the work should not exceed seven volumes, the matter in volumes five and six was increased, while the text of volume seven will fall a little below the general average. The general result will be, that the work will average nearly 940 pages to a volume, which is a large general average, considering the size of the page and of the type.

In writing the text the concise style has been adhered to, and the aim has been to furnish maxims with illustrations and authorities. No argument or discussion of doubtful points has been permitted. The rule has been given, and if correctly stated, it needs no argument, while, if wrong, the longer the argument the worse the error.

In thus furnishing the largest collection of legal and equitable principles, with the numerous qualifications and illustrations, the author has aimed to furnish a useful daily handbook for the student, the practitioner and the court. The very generous patronage of the work has placed the writer under further obligations to the profession. In conclusion, it only remains to say that a most laborious and conscientious effort has been made to serve those for whom the work has been written; and, if the value of the work shall prove equal to the effort made to render it useful, it cannot fail to render somewhat lighter the toils of the study, the practice and the application of the law.

WILLIAM WAIT.

ALBANY, *June* 30, 1879.

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CHAPTER XXIX.

FRAUDS, STATUTE OF.

ARTICLE I.

GENERAL RULE AND PRINCIPLES.

Section 1. Definition and nature. The Statute of Frauds is the name commonly given to the statute 29 Car. II, c. 3, entitled "An Act for the Prevention of Fraud and Perjuries."

The multifarious provisions of this celebrated statute appear to be distributed under the following heads: 1. The creation and transfer of estates in land, both legal and equitable, such as by common law could be effected by parol, *i. e.*, without deed. 2. Certain cases of contracts which at common law could be validly made by oral agreement. 3. Additional solemnities in cases of wills. 4. New liabilities imposed in respect of real estate held in trust. 5. The disposition of estates *pur autre vie*. 6. The entry and effect of judgments and executions. The first and second heads, however, comprise all that in the common professional use of the term is meant by the statute of frauds. And they present this important feature, characterizing and distinguishing all the minor provisions which they both contain, *i. e.*, that whereas prior to their enactment, the law recognized only two great classes of contracts, conveyances, etc., those which were by deed and those which were by *parol*, including under the latter term alike what was written and what was oral, these provisions introduced into the law a distinction between *written* parol and *oral* parol transactions, and rendered a writing necessary for the valid performance of the matters to which they relate. Those matters are the following: Conveyances, leases, and surrenders of interests in lands; declarations of trusts of interests in lands; special promises by executors or administrators to answer damages out of their own estate, special promises to answer for the debt, default, or miscarriage of another; agreements made upon consideration of marriage; contracts for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; agreements not to be performed within the space of one year from the making thereof; contracts for

the sale of goods, wares, and merchandise for the price of ten pounds sterling or upward. All these matters must be, by the statute, put in writing, signed by the party to be charged, or his attorney.

In regard to contracts for the sale of goods, wares, and merchandise, the payment of earnest money, or the acceptance and receipt of part of the goods, etc., dispenses with the written memorandum.

The substance of the statute, as regards the provisions above referred to, has been re-enacted in almost all the States of the Union; and in many of them, other points coming within the same general policy, but not embodied in the original English statute, have been made the subject of more recent enactments: As, for instance, the requirement of writing to hold a party upon a representation as to the character, credit, etc., of a third person. The legislation of the different States on these matters will be found collected in the appendix to Browne's Treatise on The Statute of Frauds, pp. 503-541, 3d ed. See 1 Bouv. Law Dict. 614; 2 Kent's Comm. 510.

The statute applies as well to executory as to other contracts, and, generally, cannot affect executed contracts. *Post*, p. 11, Art. 2, § 7; *Ben-nett v. Hull*, 10 Johns. 364; *Swanzy v. Moore*, 22 Ill. 63; *Ide v. Stanton*, 15 Vt. 685. It reaches fraudulent executions as well as fraudulent judgments. *Wilder v. Fondry*, 4 Wend. 100; S. C., 6 Cow. 284.

The defense of the statute of frauds is personal and can only be relied on by the parties or their privies. *Chicago Dock Co. v. Kinzie*, 49 Ill. 289. See *Glenn v. Rogers*, 3 Md. 312.

The object of the statute is to afford protection against frauds and perjuries, and the means employed are requiring a written memorandum, and preventing a recovery upon mere oral proof. And the signing of the memorandum of agreement by one party only is sufficient, provided it be the party sought to be charged. He is estopped by his signature from denying that the contract was validly executed, though the paper be not signed by the other party, who sues for the performance. 2 Kent's Comm. 510; 2 Starkie on Ev. 614; *Parton v. Crofts*, 16 C. B. (N. S.) (111 Eng. Com. L.) 11; Comyn on Contracts, 123. By the words "the party to be charged" in the statute of frauds the defendant in the action is to be understood. *Newby v. Rogers*, 40 Ind. 9. He is the party to be charged with a liability and the one intended to be protected against the dangers of false oral testimony. To say that the plaintiff or the party seeking to enforce a contract is himself a party to be charged therewith is a perversion of language. The term "parties" is used in connection with the words "to be charged thereby," and does not include *all* the parties to the contract. It is, on the con-

trary, limited and restricted, by the qualifying words, to such only of those parties as are to be bound or held chargeable and legally responsible on the contract, or on account of a liability created by or resulting from it. If to include all the parties had been intended, those words "to be charged thereby" would have been unnecessary and superfluous. The appropriate language to express such intention would have been, that the note or memorandum should be subscribed "by all the parties thereto," or "by the parties thereto," or some such general terms. *Justice v. Lang*, 42 N. Y. (3 Hand) 493; 1 Am. Rep. 516. See *Saunderson v. Jackson*, 2 Bos. & Pul. 238; *Egerton v. Mathews*, 6 East, 307; *Allen v. Bennett*, 3 Taunt. 169; *Marqueze v. Caldwell*, 48 Miss. 23. Mutuality of obligation is not essential to render a party liable upon a contract. If there is a consideration for his undertaking, he is bound; and the fact that the contract may not be enforceable against one party, because not subscribed by him, is no defense to the other by whom it is subscribed. The object of the statute is attained by protecting a vendor against a liability, founded on oral evidence only of his contract, without relieving him from an obligation clearly assumed and created by a written evidence thereof, the evidence of which, under such circumstances, would make the statute the means of perpetrating fraud, as well as a protection against it, and against perjury or subornation of perjury. *Justice v. Lang*, 42 N. Y. (3 Hand) 493, 522; 1 Am. Rep. 516. See *Brooklyn Oil Refinery v. Brown*, 38 How. (N. Y.) Pr. 444.

The statute of frauds does not restrict parties from a voluntary performance of their parol engagements. *Aicardi v. Craig*, 42 Ala. 311; *Godden v. Pierson*, id. 370; *Philbrook v. Belknap*, 6 Vt. 383. It has no application to a contract which has been performed on both sides. *Brown v. Bellows*, 4 Pick. 179. A contract within the statute of frauds is not illegal, but only not capable of being enforced against the defendant without writing, an immunity which the defendant may waive. Hence where parol evidence of such a contract was given by the plaintiff, without objection by the defendant at the time it was offered, and not until the testimony was closed, and the arguments to the jury had been commenced, it was held that the defendant had waived his right to object to the testimony. *Montgomery v. Edwards*, 46 Vt. 151; 14 Am. Rep. 618.

The statute of frauds does not prevent showing a mistake in a written instrument by parol evidence, for the purpose of sustaining a suit in equity to correct the mistake. *McLennan v. Johnston*, 60 Ill. 306. But the courts are uniformly inclined to give the words of the statute of

frauds full effect, and to refuse to sanction a latitudinous construction thereof. *Delbenthal v. Jones*, 53 Mo. 460, 463.

A written contract falling within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. *Swain v. Seamens*, 9 Wall. 254. An agreement to take a share in a trading adventure, being merely executory, is not required by the statute of frauds to be in writing. *Coleman v. Eyre*, 45 N. Y. (6 Hand) 38; *Green v. Brookins*, 23 Mich. 48; 9 Am. Rep. 74. And where a statute requires an undertaking to be entered into to give a right of appeal, it is valid, although it does not express a consideration. The statute of frauds only applies to common-law agreements, and not to instruments created under special statutes. *Bildersee v. Aden*, 62 Barb. (N. Y.) 175; S. C., 12 Abb. Pr. (N. S.) 324; *Thompson v. Blanchard*, 3 N. Y. 335.

A proposition by letter for the assignment of a judgment, if accepted by letter, and stating the consideration and the names of the contracting parties, is not within the statute of frauds. *Abbott v. Shepard*, 48 N. H. 14.

A contract, void by the statute of frauds, is void for all purposes; it confers no right and creates no obligation as between the parties to it; and no claim can be founded upon it as against third persons. It cannot be enforced directly or indirectly. The plain intent of the statute is, that no person shall be subjected to any liability upon such an agreement, and an individual, entering into such void agreement with an agent, cannot recover of his principal for a violation of the agreement. *Dung v. Parker*, 52 N. Y. (7 Sick.) 494. But where there is a parol contract to sell and deliver personal property to the plaintiff, and the defendant fraudulently induces the seller not to perform his contract, which, but for such fraud, he would have done, an action lies in favor of the plaintiff against the defendant. *Rice v. Manley*, 66 N. Y. (21 Sick.) 82, 87; 23 Am. Rep. 30, explaining the case last cited. The written evidence of a contract, necessary to satisfy the statute of frauds, must be in existence at the time of the action brought on such contract. *Bird v. Munroe*, 66 Me. 337; S. C., 22 Am. Rep. 571. See *Baltzen v. Nicolay*, 53 N. Y. (8 Sick.) 467.

Where a corporation is empowered by its charter to expel members in the manner to be prescribed by its rules and by-laws, a by-law providing for the expulsion of a member for the non-fulfillment of any contract, whether written or verbal, is reasonable, and authorizes the expulsion of a member for refusing to perform a contract void by the statute of frauds. *Dickenson v. Chamber of Commerce, etc.*, 29 Wis. 45; 9 Am. Rep. 544.

§ 2. **Of the validity of verbal contracts.** A parol contract within the provisions of the statute of frauds cannot be made the ground of a defense. But if it be treated as obligatory by the parties until it is executed, it is not void. *Wheeler v. Frankenthal*, 78 Ill. 124. And see the preceding section.

A parol contract for the sale of real and personal property, which is entire, and founded upon one and the same consideration, is void, as well in respect to the personal as the real property. *Thayer v. Rock*, 13 Wend. 53; *Harsha v. Reid*, 45 N. Y. (6 Hand) 415, 420; *Harmann v. Reeve*, 18 C. B. 587. See *post*, p. 43, Art. V, § 2.

A resulting trust is not within the New York statute of frauds, and may be proved by parol. *Jackson v. Mutsdorf*, 11 Johns. 91.

A subsequent contract between the parties, by the terms of which the vendee, for a valuable consideration received, agrees to waive his right to insist on the performance of conditions precedent, and take the property subject to the incumbrances and pay the balance due, is not a contract within the statute of frauds, and may be proved by parol. *Negley v. Jeffers*, 28 Ohio St. 90; *Green v. Vardiman*, 2 Blackf. 324; *Stearns v. Hall*, 9 Cush. 31.

A verbal agreement between A and B for the payment, by the former, of an indebtedness of the latter to C, is not within the statute of frauds; and where B has afterward been compelled to pay said indebtedness, he may maintain an action on said contract against A. *Crim v. Fitch*, 53 Ind. 214; *Eastwood v. Kenyon*, 11 Ad. & E. 438. See *Blair, etc., Land Co. v. Walker*, 39 Iowa, 406.

§ 3. **Of contracts partially within the statute.** If part of a contract is void by operation of the statute of frauds, the whole contract is void. *Dow v. Way*, 64 Barb. (N. Y.) 255; *Frank v. Miller*, 38 Md. 450; *Hobbs v. Wetherwax*, 38 How. (N. Y.) Pr. 385; *Fuller v. Reed*, 38 Cal. 99; *Savage v. Canning*, 1 Ir. R. C. L. 434; S. C., 16 W. R. 133. Thus, a contract for the sale of land where the writing fixed the price, but referred to "terms as specified," not in the memorandum, cannot be made good by parol evidence of the time agreed upon for payment. *Wright v. Weeks*, 25 N. Y. (11 Smith) 153. But an oral agreement to pay for past and future board of the child of another at a certain weekly rate, is severable, and so much of it as is not within the statute of frauds will support an action on a general count for the child's board. *Haynes v. Nice*, 100 Mass. 327; 1 Am. Rep. 109.

ARTICLE II.

OF PROMISES TO ANSWER FOR THE DEBT, DEFAULT, ETC., OF ANOTHER.

Section 1. In general. A promise to pay the debt of another is within the statute of frauds and void, if not in writing. *Fish v. Hutchinson*, 2 Wils. 94. So, a parol promise to pay the debt of another, and also to do some other thing, is void. And the plaintiff cannot separate the two parts of such a contract. *Chater v. Beckett*, 7 T. R. 201. But a promise to a debtor to pay his debt to a third person is not a promise to answer for the debt of another within the statute, which applies only to promises made to the person to whom another is answerable. *Eastwood v. Kenyon*, 11 A. & E. 438; *Crim v. Fitch*, 53 Ind. 214. The statute does not apply to a promise to pay the debt of a third person, where, by the receipt of an adequate consideration, such debt has become also the party's own debt. *Robinson v. Gilman*, 43 N. H. 485. The provision of the statute of frauds, with regard to a promise to answer for the debt or default of a third person, was intended only to apply to contracts strictly of suretyship or guaranty; and where no credit to such third person, and the consideration does not move from him, and he is not to be benefited, the statute does not apply, although such third person is primarily liable. If the promise is on a sufficient consideration, moving between the immediate parties to it, and from which the promisor is to derive a benefit in view of which the promise is made, it becomes a new and independent contract existing entirely between the immediate parties to it. *Reed v. Holcomb*, 31 Conn. 360. But see *post*, pp. 13, 21, §§ 9, 10.

The statute of frauds does not require the promise of a defendant to be in writing where it is in effect to pay his own debt, though that of a third person be incidentally guaranteed; it applies to the mere promise to become responsible, but not to actual obligations. Hence, where contractors to build a railroad, on settlement with a sub-contractor for work done for them, gave in part payment one of the notes of the company, verbally agreeing to pay it if the company did not, the promise was held not to be within the statute of frauds; and it was also held that on failure of the company to pay their note, an action would lie against the promisors. *Malone v. Keener*, 44 Penn. St. (8 Wright) 107; *Johnson v. Gilbert*, 4 Hill, 178. But, in Massachusetts, an oral guaranty of the payment of the note of a third person, given in payment of a debt of the guarantor, is within the statute of frauds, and void. *Dows v. Swett*, 120 Mass. 322.

A promise to discount the bills of a third person is a promise to

answer for the default of another, and must be in writing. *Mallett v. Bateman*, L. R., 1 C. P. 163 ; 35 L. J. C. P. 40 ; S. C., 12 Jur. (N. S.) 122 ; 14 W. R. 225.

§ 2. **Promises by executors or administrators.** A verbal promise by an administrator to pay the debt of his intestate, is without consideration, if there are no assets, and void under the statute of frauds, unless reduced to writing. *Sidle v. Anderson*, 45 Penn. St. 464. A promise to pay a debt of a testator by an executor who has given a bond to the judge of probate to pay the testator's debts and legacies, is not within the statute of frauds, for the bond is an admission of assets. *Stebbins v. Smith*, 4 Pick. 95.

§ 3. **Promises for the debt, default, etc., of another.** An oral promise to pay the debt of another is within the statute of frauds, if there is no consideration whatever moving between the creditor and the new promisor, the only consideration being a conveyance of real estate to the latter by the original debtor. *Furbish v. Goodnow*, 98 Mass. 296. An oral promise by a third person, to a seller of goods who has refused to deliver without security for the price, that, if he will make delivery, the promisor will see that he gets his pay, is within the statute of frauds, and must be in writing, even though the delivery was made on the faith of the promise. *Pettit v. Braden*, 55 Ind. 201. The test, as to whether the defendant in such case is liable, is whether any credit *whatever* was given to the person receiving the property ; and if there was, then the defendant is not liable. *Id.* ; *Bloom v. McGrath*, 53 Miss. 249. A promise by the payee and holder of a note, to the maker, that, if the latter will forbear issuing execution on a judgment he holds against a third person, the promisor will pay the judgment by allowing the amount as a credit on the note, is within the statute of frauds, and void if not in writing. *Krutz v. Stewart*, 54 Ind. 178 ; *Beasten v. Hendrickson*, 44 Md. 609. A verbal promise to hold the surety in a replevin bond harmless, being a promise to answer for the default of another, the principal, is within the statute of frauds. *Bissig v. Britton*, 59 Mo. 204 ; 21 Am. Rep. 379.

A parol promise to pay the debt of another, in consideration of forbearance to sue the original debtor, without any new or superadded consideration moving from the creditor to the promisor, is void under the statute of frauds. *Thomas v. Delphy*, 33 Md. 373 ; *Duffy v. Wunsch*, 42 N. Y. (3 Hand) 243 ; 1 Am. Rep. 514 ; S. C., 8 Abb. Pr. (N. S.) 113.

The promise of an individual member of a firm to give his personal guaranty for the faithful performance of a contract by his firm, is within the statute of frauds and should be in writing. *Smith v. Bowler*,

2 Disney (Ohio), 153. A mechanic who repairs a chattel which is mortgaged, and who gives up his lien at the request of the mortgagor and delivers the chattel to him upon the oral promise of the mortgagee to pay for the repairs, is not within the statute and is valid. *Conradt v. Sullivan*, 45 Ind. 181; 15 Am. Rep. 261.

A debtor cannot rely upon a parol agreement of another to pay his debt, such agreement being within the statute of frauds; but he must show in addition an actual substitution of the third person for himself, by an agreement of all the parties, or an actual compliance with the terms of the agreement; willingness to pay as agreed by the third person, and to receive payment from him by the creditor, is not sufficient. *Buchanan v. Paddleford*, 43 Vt. 64.

A parol promise to pay the debt of another to a third party, founded on a valuable consideration, may be enforced in equity. *Hodgkins v. Jackson*, 7 Bush (Ky.), 342.

Where the gist of an action for money had and received is the defendant's false representations as to the financial standing of another, the statute of frauds is available as a defense. *Hunter v. Randall*, 62 Me. 423; 16 Am. Rep. 490.

A parol promise to pay the debt of another is not rendered valid under the statute, by the fact that the party promising receives a good consideration therefor. *Belknap v. Bender*, 6 Thomp. & C. (N. Y.) 611; S. C., 4 Hun, 414. But where the transaction amounts to a novation, parol evidence is admissible to establish the promise of one to pay the debt of another. *Bowen v. Kurtz*, 37 Iowa, 239.

A promise of a forwarder of goods to the common carrier to pay any draft on himself by the consignee for the transportation of the goods, is a promise to pay the debt of another. *Wakefield v. Greenhood*, 29 Cal. 597. No action can be maintained against a father on his oral promise to pay a debt not incurred for necessities, of a minor son, in consideration of the creditor's forbearing to sue the son. *Dexter v. Blanchard*, 11 Allen (Mass.), 365.

§ 4. **When such promise is valid.** Where the promise to pay the debt of another arises out of some new and original consideration moving between the newly contracting parties, the case is not within the statute of frauds. *Johnson v. Knapp*, 36 Iowa, 616. But see *post*, p. 13, § 9; *Hardy v. Blazer*, 29 Ind. 226; *Shook v. Vanmater*, 22 Wis. 532; *Jennings v. Crider*, 2 Bush (Ky.), 322; *Alcalda v. Morales*, 3 Nev. 132. Though a verbal promise be in form to pay the debt of another, yet if the promisor's intent be not merely to pay such debt, but also to subserve a purpose of his own, his undertaking is not affected by the statute. *McCreary v. Van Hook*, 35 Tex. 631; *Tisdale v.*

Morgan, 7 Hun, 583. An oral promise by B, made to C, and founded upon a consideration passing between him and C, to pay a debt due from C to the plaintiff, is a valid promise, and the plaintiff can maintain an action thereon. *Barker v. Bradley*, 42 N. Y. (3 Hand) 316; 1 Am. Rep. 521.

An oral promise to indemnify one for indorsing the promissory note of another, where the indorsement is made, relying solely upon such promise, the promise is not void under the statute. *Vogel v. Melms*, 31 Wis. 306; 11 Am. Rep. 608. So, a promise, that if another person will sign a note, the promisor will pay it, though made verbally, before signing the note, and being the only consideration for signing it, is not within the statute of frauds. *Godden v. Pierson*, 42 Ala. 370. See *Ford v. Hendricks*, 34 Cal. 673. A contract between sureties to the same instrument, whereby one surety undertakes to indemnify another, is not within the statute, and is valid by parol. *Horn v. Bray*, 51 Ind. 555; 19 Am. Rep. 742.

Where a party who was not before liable, undertakes to pay the debt of a third person, and as a part of the agreement the original debtor is discharged from his indebtedness, the agreement is not within the statute of frauds. Hence, where one, thus undertaking, agreed "to pay and guarantee" the debt, it was held that the word "guarantee" was not to be understood in a technical sense, but the agreement was an absolute agreement to pay, and that *indebitatus assumpsit* would lie. *Packer v. Benton*, 35 Conn. 343. So a parol agreement of a grantee to pay a debt of the grantor, made as part of the consideration, is not an undertaking to "answer for the debt or default of another." *Jennings v. Crider*, 2 Bush (Ky.), 322; *Berry v. Doremus*, 30 N. J. Law, 399; *Seaman v. Hasbrouck*, 35 Barb. 151; *Tisdale v. Morgan*, 7 Hun, 583. So an oral promise by a debtor to pay a part of his debt by paying the debt of his creditor to a third person, who subsequently agrees to the arrangement, is valid, and the promise is not within the statute of frauds. *Putnam v. Farnham*, 27 Wis. 187; 9 Am. Rep. 459.

A mortgagee may maintain an action on an oral promise of a vendee of the mortgaged premises to pay the mortgage as a part of the purchase-money. *Ruhling v. Hackett*, 1 Nev. 360. Where one holds property charged with the payment of a debt to another, upon his verbal promise to the vendor to pay the debt, the promisor is liable to an action by the creditor. *Townsend v. Long*, 77 Penn. St. 143; 18 Am. Rep. 458.

When a third party promised verbally to pay a sheriff the amount of an execution, if he would not sell the defendant's horse, and the

sheriff was compelled to pay the debt, it was held that the promise was not within the statute of frauds nor contrary to public policy. *Bohannon v. Jones*, 30 Ga. 488; *Tindal v. Touchberry*, 3 Strobb. 177; *Mreccin v. Andrus*, 10 Wend. 461.

§ 5. **When such promise is void.** See *post*, p. 21, § 10, and *ante*, p. 7, § 3. A verbal promise to pay the mortgage debt, made by the purchaser of an equity of redemption after the purchase and not connected with the consideration to be paid therefor, cannot be enforced by the mortgagee, although a valuable consideration may have been given for the promise. Such an undertaking is void by the statute of frauds. *Berkshire v. Young*, 45 Ind. 461. And a naked verbal promise of the husband, made before or after the marriage, to pay an ante-nuptial debt of the wife, she not being released from its payment, is within the statute of frauds and cannot be enforced. *Cole v. Shurtleff*, 41 Vt. 311. So a promise by one creditor to pay the debt of another creditor of the same debtor, in consideration of the second creditor's forbearing to attach the debtor's property, is within the statute of frauds. *Waldo v. Simonson*, 18 Mich. 345.

B, at A's request, and on A's promise to indemnify him against all liability therefor, entered into recognizances for the appearance of A's daughter in a criminal court. She did not appear there and the recognizances became estreated, and it was held that A's promise was within the statute of frauds, and that, therefore, no action lay on it if not in writing. *Cripps v. Hartnoll*, 2 B. & S. 697.

Where goods are sold at the request of a third party, and on the promise of the latter to be responsible for the price, such promise is void under the statute of frauds, unless in writing, if there is any liability from the purchaser to the vendor. Such liability is conclusive that the promise is collateral and not original. *Read v. Ladd*, 1 Edm. (N. Y.) Sel. Cas. 100.

An oral promise by the defendant to pay the plaintiff a debt due him from a railroad company, if he would procure the passage of a resolution by said company, requesting such payment, not being founded upon any new consideration of benefit to the promisor, is void by the statute of frauds. *Osborne v. Farmers', etc., Co.*, 16 Wis. 35. An oral promise by a mortgagee of part of a vessel, to pay for supplies before furnished for the vessel, but for which no lien existed, if the persons furnishing the supplies would not attach the vessel, is void by the statute. *Ames v. Foster*, 106 Mass. 400; 8 Am. Rep. 343.

§ 6. **Consideration for such promise.** A written promise to pay the debt of another is of no force, unless based upon a good and valid consideration. *Cook v. Elliott*, 34 Miss. 586; *Winkler v. Ches-*

peake & Ohio R. R. Co., 12 W. Va. 699. But the promise of one person, though in form, to answer for the debt of another, if founded upon a new and sufficient consideration, moving from the creditor and promisee to the promisor, and beneficial to the latter, is not within the statute of frauds, and need not be in writing, subscribed by him and expressing the consideration. *Dyer v. Gibson*, 16 Wis. 557. But see *post*, pp. 13, 21, §§ 9, 10.

The receipt or non-receipt of consideration by a promisor does not determine in every case whether a promise to pay the debt of another is within or without the statute of frauds, but the inquiry remains, whether he entered into an independent obligation of his own, or whether his responsibility was contingent upon the act of another. *Brown v. Weber*, 38 N. Y. (11 Tiff.) 187. A verbal promise to sell goods to a responsible party for full value and on the usual terms, forms no consideration for an independent engagement to pay the antecedent debt of a third person. *Pfeifer v. Adler*, 37 N. Y. (10 Tiff.) 164. In Indiana the consideration of a promise to answer for the default of another, need not be expressed in the memorandum. *Hiatt v. Hiatt*, 28 Ind. 53.

A parol promise to assume an antecedent debt of a third person, upon consideration that the creditor will cancel and extinguish the debt and release the debtor, which is done, is not within the statute of frauds. *Meriden Britannia Co. v. Zingsen*, 48 N. Y. (3 Sick.) 247; 8 Am. Rep. 549; *Day v. Cloe*, 4 Bush (Ky.), 563.

A parol agreement, made in consideration of a deed of land, to pay a debt of the grantor is not a promise to pay the debt of another, within the statute of frauds. *Berry v. Doremus*, 1 Vroom (N. J.), 399. Forbearance and giving time of payment to the debtor, at the request of a third person, is a sufficient consideration for a promise of payment of the debt by him. *Calkins v. Chandler*, 36 Mich. 320; 24 Am. Rep. 593. See *ante*, p. 8, § 4. Where the consideration for a written unsealed guaranty cannot be collected or implied with *certainty*, from the *instrument itself*, without recourse to parol proof, or to other papers unconnected with it save by such proof, the guaranty is void. *Deutsch v. Kanders*, 46 Md. 164.

§ 7. Part performance of such promise. A part performance of a contract, void by the statute of frauds, may render it binding and valid as far as that performance extends, but it can have no effect upon any remaining stipulations still continuing executory. As to those, the statute remains operative, declaring them to be void, for, if the power existed to maintain an action for the non-performance of one portion of a contract, void by the statute of frauds, it is difficult to see

what would stand in the way of allowing the same thing to be done where an entire omission to perform might be shown by the evidence. *Weir v. Hill*, 2 Lans. (N. Y.) 278.

In order to take a case out of the operation of the statute, on the ground that it is partly performed, there must be such a part performance of it on the part of the plaintiff as would render it a fraud on him by the refusal of the defendant to comply with the contract on his part. *Burnett v. Blackmar*, 43 Ga. 569. The part performance must be substantial and the acts of part performance must also clearly appear to have been done solely with a view of performing the agreement. So, where, in reliance upon the agreement, one party has so far partly performed that it would be a fraud upon him unless the agreement should be performed, or where the agreement attempts to create a trust and was induced by fraud, the court has equitable jurisdiction to relieve against the fraud and to apply a remedy by enforcing the agreement. In such case the jurisdiction is not founded upon the agreement, but upon the fraud. *Wheeler v. Reynolds*, 66 N. Y. (21 Sick.) 227.

A promise upon which the statute of frauds declares that no action shall be maintained, cannot be made effectual by estoppel, merely because it has been acted upon by the promisee and not performed by the promisor. *Brightman v. Hicks*, 108 Mass. 246. Where a father, shortly before the marriage of his daughter, told her intended husband that he meant to give certain leasehold property to the couple on their marriage, and after the marriage he gave up possession of the property to the husband, handed him the title deeds and directed the tenants to pay rent to him, and the husband expended money on the property, it was held to be a sufficient part performance to take the case out of the statute of frauds. *Surcome v. Pinniger*, 3 DeG., Mac. & G. 571; S. C., 17 Eng. Law & Eq. 212; 17 Jur. 196; 22 L. J. Chanc. 419.

Where the services of a clerk had been continued for some years, it was held, in an action for dismissing him before the end of the year, that the agreement need not be in writing. *Beeston v. Collyer*, 4 Bing. 309; S. C., 2 C. & P. 607; 12 Moore, 552.

A contract for the making and sale of bricks above 20*l.*, to be delivered within a year from the time when, according to the defendants' evidence, the contract was completed, by a letter of his in answer to a parol proposal, is valid, there having been a part acceptance and payment on account. *Catling v. Perry*, 2 F. & F. 140.

Where a parol contract was made in November, 1865, for the rent of a plantation for the year 1866, and the defendant went into possession of the place, in pursuance of the contract, and cultivated it for the

year 1866, this is such a part performance of the contract as will take it out of the operation of the statute of frauds. *Rosser v. Harris*, 48 Ga. 512.

Where a debtor and creditor arranged orally that the debt should be paid partly in money and partly in lands, and the debtor paid the money and also satisfied a mortgage which incumbered the land in question, it was held that neither of those acts were a part performance of the contract to accept the land as payment such as to take the case out of the statute of frauds, such part payment was but payment of so much of an existing debt, and the discharge of the mortgage was not a fact of part performance at all, but merely a preparatory act to put the vendor in condition to tender performance. *Colgrove v. Solomon*, 34 Mich. 494.

Where a contract, by which one party was to build a dam and the other party to pay therefor in certain installments, was signed only by the first party, but it appeared that the other party paid his installments as therein provided, and both acted upon it as binding, it was held that it was executed and binding. *Reedy v. Smith*, 42 Cal. 245.

The building of a party-wall under a parol agreement that the adjacent owner will pay for one-half of as much as he shall use when he builds is a part performance taking the case out of the statute of frauds. *Rawson v. Bell*, 46 Ga. 19. Vol. 2, pp. 72, 725.

The doctrine, that an agreement that mutual debts shall be applied in satisfaction of each other, operates as a satisfaction of both, will not constitute a payment such as will save an oral agreement from the statute of frauds. *Mattice v. Allen*, 3 Abb. (N. Y.) App. Dec. 248; 3 Keyes, 492; 3 Trans. App. 263.

§ 8. **Promise, to whom made.** Work having been done under a contract with a person to whom the original credit was given, whoever may have owned the property, the contract is valid; such an agreement does not come within the statute of frauds. *Backus v. Clark*, 1 Kans. 303.

§ 9. **Original promise.** This statute appears to be one which need not cause any great difficulty in its application to practice, and yet, few questions have perplexed the courts more than those arising upon its true construction. A careful examination of the subject will show that the main difficulties which have arisen in the matter have been created by the courts themselves, and have not been caused by any inherent intricacy in the statute itself.

The statute renders void those oral promises which are made for the answer for the debt, default or miscarriage of another person. And, under this statute, the sole question which can arise upon that point in

any case, is, does the promise assume to answer for the debt, default or miscarriage *of another person*. If such is the character of the promise, it is clearly within the statute and void.

In some of the early cases under the English statute of frauds, the courts introduced two words into the discussion, which are not to be found in the statute. Those words were "original" and "collateral." And, instead of determining whether a given promise was one which assumed to answer for the debt, default or miscarriage *of another person*, the inquiry made was, whether the promise was an *original* or a *collateral* one. If it was determined to be an original one, it was held not to be within the statute, and was valid; but if it was a collateral one, it was held to be within the statute, and void. These words are sometimes appropriately used for expressing the character of the promise, but they are frequently ambiguous in their application, and hence their use would inevitably lead to error. An original promise properly signifies the first promise which a party makes; and, in its common use by the courts, it was also employed to signify a promise which a person makes on his own behalf, as distinguished from a promise to answer for some other person. It will be evident, however, that courts cannot properly use the word "original" as synonymous with the statute language of a promise to answer for the debt, etc., of another person. Suppose that A is indebted to B in the sum of \$100, and that subsequently C enters into an oral agreement to pay this debt, for a sufficient consideration advanced; if C was not originally a party to the arrangement between A and B in the creation of the debt of \$100, nor liable for its payment, it is evident that the promise of C to pay it is an original promise, in the sense that it is his first promise; but, although it is an original promise, it is none the less a promise to pay the debt of A, a third person, and, therefore, directly within the language and the spirit of the statute.

In such cases, it is useless to determine whether the promise is an original one or not, so long as it is clear that it is a promise to answer for the debt, etc., of another person.

The term *collateral* promise, properly signifies one which runs with another promise, and as an auxiliary or guaranty. But the statute does not use this word, and the language of the statute is not synonymous with the word "collateral."

It is true, that in some instances, the word "collateral" will properly express the nature of a given promise; but, that does not by any means show that the word is synonymous in all instances. If A is about to purchase goods of B, and C is present at the time, and promises B that he will pay for the goods delivered to A if he does not

pay for them ; this may be said to be a collateral promise with that of A to pay for the goods. And, in this instance, it is also a promise to pay for the default or miscarriage of another person. But, it is also an original promise, because it is the first promise ; so that it is literally an original promise as well as a collateral one. It is evident, however, that the courts need not decide whether such a promise is an original or a collateral one ; since it is sufficient to determine that it is a promise to answer for the default of another person, which renders it void unless in writing.

The word "collateral" has been generally used by the courts to signify a promise which is not for the liability of the promisor, but for the debt, etc., of another person, and in that sense it will not lead to the errors which have arisen from an improper use of the word "original." The improper use of these words as substitutes for the statute language naturally led to another error, which is of most mischievous consequence in its effects upon the construction of the statute. It is familiar legal learning that, at the common law, and before the statute of frauds was enacted, a promise by one person to pay the debt of another would not be binding, whether verbal or written, unless there was a consideration to support the promise. The statute of frauds has merely required that the promise and the consideration for such promises shall be stated in writing, and be subscribed by the party to be charged upon such promise. But the statute does not require this unless the promise made is one which assumes to answer for the debt of another person. If the promise is made by a person for the payment of his own debt, the statute does not apply. The fallacy which the word *original* promise causes is, therefore, evident ; because, if the courts hold that every original promise is valid, because it is not within the statute, it is clear that every promise which one person makes on assuming to pay the debt, etc., of another person, is in one sense an original promise, and it must, therefore, be valid because it is an original promise. But this is not all, for the error was carried still further. If an original promise was founded upon a new consideration advanced to the promisor, or for any other sufficient consideration, it was called an original agreement and not within the statute. Two material considerations are overlooked in such a construction of the statute, for, in the first place, the new consideration is nothing more than the common law required before the statute, and in the second place, though the promise is original in the sense that it is the first promise of the promisor, it is not the less a promise to answer for the debt, etc., of another person, and therefore directly within the statute. Every promise which one person makes to answer for the debt, etc., of another person, is a new or origi-

nal agreement on his part, and it is not binding unless it is founded upon a sufficient legal consideration. But the statute of frauds adds to this that the promise and the consideration must be evidenced by a written subscribed agreement. The time of making the promise is not in the least material, if the promise is clearly one to answer for the debt, etc., of another person. The promise may be made before the debt of the principal is created, or at the same time, or subsequently to it, but the same rule of construction applies in each case.

A promise to pay the future debt of another person which has not yet been contracted, is none the less a promise to pay the debt of a third person; and so of a promise which is made at the time the debt is created, or of one made subsequent to its creation. Two classes of cases may be noticed here to prevent an erroneous impression in relation to what has been said, though they will be more fully explained in a subsequent place. If A promises to pay a merchant for certain goods, if he will sell them to B and B does not pay for them, this will be a good ground of action against A, if the promise is reduced to writing, and the merchant, on the faith of the promise, furnishes the goods to B who does not pay for them. So, if A requests a merchant to deliver goods to B, and A orders them charged to himself, in this case he is liable, because the sale of the goods is to himself, although the delivery of them is to another person by his orders. Vol. 1, pp. 90, 91, 92, 93.

The construction which the courts have sometimes given to the statute has promoted the very mischief which the enactment of the statute was designed to prevent. The obvious intent of the statute is, that no person shall be made liable to answer for the debt, default or miscarriage of another person unless his promise is reduced to writing and subscribed by him, and also that the written promise shall show a consideration for the promise. If the intent of the statute is carried into effect, there will be little danger of frauds and perjuries in charging one person with the debts, etc., of another; and the reason is obvious, since there must be a written subscribed promise produced before the plaintiff can recover; so that forgery must be added to fraud and perjury before any person can be in danger of being compelled to pay the debt, or answer for the default or miscarriage of another. But, if the construction as to original promises is to obtain, as it has been applied in some cases, the statute is a mere dead letter, so far as its value relates to a prevention of frauds and perjuries.

Under such a rule, no fraudulent plaintiff would claim that the defendant was liable upon a promise to answer for the debt, etc., of a third person, because, in that case, a written subscribed promise would

be indispensable to a recovery; for it is clear that an express verbal promise would not make the defendant liable.

But, if it is established as a rule of law, that a promise to pay the existing debt of another can be enforced through the medium of an original, verbal promise, founded upon a new consideration, the value of the statute must be materially impaired if not rendered entirely inoperative. Suppose that A should trust B with goods, which are not paid for by B as he agreed, it is clear, from all the cases, that C could not be made liable upon a verbal promise to A that he would pay for the goods if B did not. If, however, the rule is established that C may be made liable to A upon the verbal promise to pay the debt of B, if the promise is founded upon a new consideration, the statute is effectually repealed by judicial construction, because that was the rule at the common law before the statute was enacted; and the sole object of the statute was, to require such agreements to be reduced to writing. Such a construction would let in all the mischiefs which the statute would prevent if it was carried into effect according to its actual intent. There would be nothing to prevent the grossest frauds and perjuries in proving those so-called original promises, and those new considerations, which would be made available whenever it was desired to charge one man with the payment of a debt due from another. From the foregoing remarks, it is evident that the words "original" and "collateral" ought never to be used as a test to determine whether a given case is void by the statute; but, that the sole inquiry should be, is the promise one which assumes to answer for the debt, default or miscarriage of another; if it is, the promise is void unless reduced to writing and subscribed by the party to be charged upon it. See opinion of court in *Mallory v. Gillett*, 21 N. Y. (7 Smith) 414, 415, 416. The cases which have been decided in relation to this statute are very numerous, and there are several of them which are not consistent with other decisions nor with the statute itself. No attempt will be made, therefore, to reconcile conflicting decisions, and no more cases will be cited than are sufficient to show what the settled rules of construction are in relation to the different classes of cases decided. The remarks which have been made would seem to suggest the true test of the value of a decision which turned upon the words "original" or "collateral" promise.

That class of cases which stands upon the principle that a verbal promise to pay an existing debt of another person is valid if founded upon a new consideration, cannot be supported unless the statute is disregarded. To illustrate: suppose that A owes B a debt which has been due for a year, and that C, in consideration of one dollar paid to

him by B, the creditor, verbally promises to pay the debt of A, it is entirely clear that this promise is one for the payment of the debt of another person, and therefore void. There can be no doubt but that the agreement would be binding if it were reduced to writing and subscribed by C, since the consideration is legally sufficient. But, a consideration may consist of something else than a benefit to the promisor; for a detriment to the person to whom the promise is made is as valid as one in which the promisor is benefited. Vol. 1, pp. 90, 91, 92, 93. And if a creditor should forbear the collection of a debt of his debtor, at the request of a third person, who should, in consideration thereof, promise to pay the debt, this would be a sufficient consideration to make such third person liable; but this new consideration would not make a verbal promise binding within the statute.

The law does not show any partiality for any particular consideration for a promise, if the particular consideration is a legal and sufficient one. And, therefore, there is not in reality any difference in principle as to consideration, whether it is a benefit to the promisor, or a detriment to the promisee. Any consideration which is sufficient to sustain a promise to do any other act, is equally valid to sustain a promise to pay the debt of a third person. But that still leaves the statute in full force, which requires that the promise shall be in writing, and showing a consideration, etc., or it is void. There are some cases in which the effect of a verbal promise is to pay the debt of a third person, and in which the promise is held to be binding although it is merely verbal. Suppose that A is indebted to B in the sum of one hundred dollars, and that A then sells and delivers a horse to C, who in consideration of the horse promises verbally that he will pay one hundred dollars to B; the agreement, if performed, would be to pay the debt due from A to B, and it may be said, that the verbal promise of C was to pay the debt which A owed to B. This, however, is not strictly the real character of the promise. It is true that one effect of a performance of the promise would be the payment of that debt; but that is not a full statement of the transaction. For C, by the purchase of the horse, created a debt against himself in favor of A, which he was legally bound to pay to some one, and the law permits the payment to be made to such person as A may designate. For this reason an action may be maintained by B against C, to recover the purchase-price of the horse, although the effect of such transaction is to satisfy the debt due from A to B. And such an action could also be maintained by B against C, although there were no debt due from A to B. The practical result of such agreements is, that the party promising merely pays his own debt in a particular manner, and the fact that it happens

to pay the debt of a third person does not invalidate the transaction.

And it is settled by numerous cases, that when a debtor sells property, or delivers money to a third person, in consideration that he will pay an agreed sum to the creditor of such debtor, such transaction is valid and the creditor may recover the sum agreed upon. *Barker v. Bucklin*, 2 Denio, 45; *Lawrence v. Fox*, 20 N. Y. (6 Smith) 268; *Wyman v. Smith*, 2 Sandf. 331; *Farley v. Cleveland*, 4 Cow. 432; S. C., 9 Cow. 639; *Ellwood v. Monk*, 5 Wend. 235; *Stillwell v. Otis*, 2 Hilt. 148; *Seaman v. Hasbrouck*, 35 Barb. 151. Vol. 1, pp. 103, 104.

But an agreement with a creditor by a third person, that he will pay a debt due from the debtor of such creditor is void, unless it is reduced to writing, although there may be a new and sufficient consideration for the promise, if such consideration moves from the creditor or any other person than the debtor. *Jackson v. Raynor*, 12 Johns. 291; *Simpson v. Patten*, 4 Johns. 422; *Watson v. Randall*, 20 Wend. 201; *Stern v. Drinker*, 2 E. D. Smith, 401; *Darlington v. McCunn*, id. 411; *State Bank, etc., v. Mettler*, 2 Bosw. 392. In this section, and the one which follows it, some of the cases will be cited which seem to have been influenced by the words "original" and "collateral."

A promise by a third person to assume and pay a sum due to the plaintiff in consideration of the discharge of the original debtor is an original and not a collateral promise, and need not be in writing. *Wood v. Corcoran*, 1 Allen (Mass.), 405; *Warren v. Smith*, 24 Tex. 484; *Yale v. Edgerton*, 14 Minn. 194; *Britton v. Angier*, 48 N. H. 420; *Brown v. Brown*, 47 Mo. 130; 4 Am. Rep. 320; *Barker v. Bradley*, 42 N. Y. (3 Hand) 316. So, too, when one undertakes to pay the debt of another, and the motive of the promise is that, by making such payment, he will also discharge his own debt, the undertaking is not within the statute of frauds, and need not be in writing. *Besshears v. Rowe*, 46 Mo. 501; *Tibbetts v. Flanders*, 18 N. H. 284; *Goetz v. Foos*, 14 Minn. 265; *Cotterill v. Stevens*, 10 Wis. 422. A request to one to work for the benefit of a third party, or to furnish material to a third party, and a promise to pay, form an original, not a collateral, promise. *Brown v. George*, 17 N. H. 123; *Weyand v. Crichfield*, 3 Grant (Penn.), 113. And when the owner of a note as part of the terms of sale thereof, guarantees its payment, his contract is not within the statute of frauds, for the reason that the promise is made upon a new and original consideration moving between the creditor and the party promising, in an independent dealing between them. *Wyman v. Goodrich*, 26 Wis. 21; *Dauber v. Blackney*, 38

Barb. (N. Y.) 432; *Cardell v. McNeil*, 21 N. Y. (7 Smith) 336; *Mobile, etc., R. R. Co. v. Jones*, 57 Ga. 198.

It is often difficult to ascertain from the mere words of a promise whether it was a collateral or an original undertaking, and courts must rely upon the particular circumstances of each case. *Reed v. Holcomb*, 31 Conn. 360. A promise by a widow that if a creditor of her husband's estate will forbear to file his claim against the estate, or collect it from the assets, she herself will pay it, is an original undertaking, and need not be in writing. *Crawford v. King*, 54 Ind. 6. And generally it may be said that when the evidence makes a case of sales wholly on the authority, written or verbal, of the defendant, and wholly on his credit from first to last, he is an original debtor, and the law of promise to answer for the debt, default or miscarriage of another, is not applicable. *McLendon v. Frost*, 57 Ga. 448.

A land-owner, who had engaged with a cropper upon his land, to make him certain advances, promised a third person that, if the latter would make advances to the cropper, he, the land-owner, would be responsible for them and it was held that the promise need not be in writing. *Neal v. Bellamy*, 73 N. C. 384.

If a surety in an obligation, by making a promise of indemnity, procures another person to become surety with him in the instrument, this promise is not void under the statute of frauds, because not in writing; for the indemnity is promised against the promisor's own default. *Ferrell v. Maxwell*, 28 Ohio St. 383; 22 Am. Rep. 393.

A parol agreement by a grantee to pay a mortgage on the premises conveyed to him is valid. *Huyler v. Atwood*, 26 N. J. Eq. 504. *Ante*, p. 8, § 4. So where one who has an interest to procure an attachment, which has been issued against another person, to be discharged, promises to pay the debt, as a consideration for a discharge, and the attachment is discharged accordingly, this is an original undertaking, and need not be in writing under the statute of frauds. *Hedges v. Strong*, 3 Oreg. 18. *Ante*, p. 8, § 4.

A parol agreement by a purchaser of property in consideration thereof to pay certain debts of his vendor is an independent promise, not collateral to the liability of the vendor, and not within the statute of frauds. *Wilson v. Bevans*, 58 Ill. 233. A promise to pay a physician for professional services to be rendered in treating a third person is an original undertaking and not a promise to answer for the debt of another which must be in writing. *Eddy v. Davidson*, 42 Vt. 56. The promise of one creditor to pay the claim of another against their mutual debtor, in consideration of the forbearance of the latter to contest the validity of a judgment obtained by the former against the

debtor, is an original undertaking, and not within the statute of frauds. *Smith v. Rogers*, 35 Vt. (6 Shaw) 140.

Where one promises to repay to another a share of the expenses which he may incur in a suit brought at the instance of the promisor, and in reliance upon his promise, and for the mutual interest of the parties, such promise is not within the statute of frauds, as being 'a promise to pay the debt of another person. *Dorwin v. Smith*, 35 Vt. (6 Shaw) 69.

The sufficiency and validity of parol promises, as original and independent contracts, to exclude the operation of the statute of frauds, was determined in the following cases depending on particular facts. *Gridley v. Capen*, 72 Ill. 11; *Studbaker v. Cody*, 54 Ind. 586; *Potter v. Brown*, 35 Mich. 274; *Threadgill v. McLendon*, 76 N. C. 24; *Whitman v. Bryant*, 49 Vt. 512; *Walker v. Hill*, 119 Mass. 249; *Booth v. Eighmie*, 60 N. Y. (15 Sick.) 238; 19 Am. Rep. 171; *Townsend v. Long*, 77 Penn. St. 143; 18 Am. Rep. 438.

A written agreement of the defendants to pay for certain bricks to be delivered to a third person, who had contracted to build a house for them, is an original promise. *Glidden v. Child*, 122 Mass. 433.

§ 10. **Collateral promises.** See *ante*, p. 13, § 9, as to the terms original and collateral. To constitute a promise to answer for the debt, default or miscarriage of another person within the meaning of the statute of frauds, the promise must be a collateral one; there must be in existence an original liability upon which the collateral promise is founded. *Yale v. Edgerton*, 14 Minn. 194; *White v. Solomonsky*, 30 Md. 585. In order to make a promise collateral, so as to bring it within that provision of the statute which requires a promise to answer for the debt, default or miscarriage of another to be in writing, the party for whom the promise is made must be liable to the party to whom it is made. *Boykin v. Dohlonde*, 37 Ala. 577; *Downey v. Hinchman*, 25 Ind. 453. Whether an agreement is original or collateral is to be determined, not by the particular language used, but upon all the evidence in the case. *Blank v. Dreher*, 25 Ill. 331. And where the main issue is whether it was a direct, or a collateral undertaking, and the evidence is chiefly oral and not absolutely distinct in terms, or consistent in its different parts, it should be submitted to the jury under proper instructions to determine the question, and not assumed to be decided by the court. *Perkins v. Hinsdale*, 97 Mass. 157.

The promise of a railway company to pay, out of what it may become indebted to a contractor for work on its road, the sum that such contractor may owe a sub-contractor for work done, is a contract to pay the

debt of another, which must be in writing. *Laidlou v. Hatch*, 75 Ill. 11. So is the promise of A to C to sign a certain bond to C as surety of B, for the return of certain United States bonds, if C would loan them to B, upon which promise C has relied, and accordingly loaned the bonds to B. *Hayes v. Burkham*, 51 Ind. 130. So is a promise to pay the debt of another, if not paid by himself, notwithstanding the creditor is thereby induced to suffer the debtor to leave the State without paying the debt, taking his property with him. *Gillfillan v. Snow*, 51 Ind. 305. So is a promise by one to be responsible and stand good for the payment by another of wages that may accrue from the latter to the person to whom the promise is made. *Miller v. Neihaus*, 51 Ind. 401. So is an engagement to indemnify sureties against loss or liability; and such an engagement, when made in writing in the name of one party, and purporting on its face to bind no other, can no more be shown by parol to be in fact the undertaking of a different party, than could such a liability be originally created by parol. *First Nat. Bank v. Bennett*, 33 Mich. 520. An officer or stockholder in a corporation is not personally liable for goods sold and delivered, on the ground that he promised to see the bill paid, unless his promise is in writing; nor on the ground that he stated that the corporation was solvent when it was not, if his statement was made in good faith. *Searight v. Payne*, 2 Tenn. Ch. 175. A parol promise to pay for goods sold to B, if B did not pay for them, though made before the delivery of the goods, is a collateral undertaking within the statute. *Jones v. Cooper*, Cowp. 227; *Matson v. Wharam*, 2 T. R. 80; *Peckham v. Faria*, 3 Doug. 13; *Swift v. Pierce*, 13 Allen (Mass.), 136; *McDonell v. Dodge*, 10 Wis. 106. A promise to pay an existing debt, if the debtor does not pay it, is within the statute. *Dufolt v. Gorman*, 1 Minn. 301.

ARTICLE III.

CONTRACTS IN CONSIDERATION OF MARRIAGE.

Section 1. In general. The statute of frauds as to contracts made in consideration of marriage does not make them void, if they are not in writing, but merely prohibits or prevents an action on them. If they have been executed, the rights of property acquired under them are just as sacred as if the contracts had been made and signed by the parties. *Crane v. Gough*, 4 Md. 316. And a promise to marry, in consideration of a similar promise by the other party, is not within the statute of frauds. *Clark v. Pendleton*, 20 Conn. 495; *Withers v. Richardson*, 5 Monr. 94. It only embraces agreements to pay marriage portions,

And such agreements must be wholly reduced to writing; the consideration as well as the promise must be in writing. *Ogden v. Ogden*, 1 Bland, 284. A *marriage brokage* contract is void on grounds of public policy. *Crawford v. Russell*, 62 Barb. 92.

§ 2. **What are such contracts.** The statute of frauds is never allowed as a protection to frauds, or as the means of seducing the unwary into false confidence to their injury. The doctrine that the statute applies to agreements in consideration of marriage, where reliance is placed solely on the honor, word or promise of the party, is restricted to cases of marriage, and does not apply to cases where there has been a part performance on the other side. *Jenkins v. Eldredge*, 3 Story, 181. Although marriage is not *per se* a part performance of an ante-nuptial marital contract, sufficient to take it out of the statute of frauds, yet it is a sufficient consideration for such a contract, and one which courts regard with favor. *Crane v. Gough*, 4 Md. 316.

A promise to marry, after the defendant's return from a contemplated voyage, on which it was expected he would be absent eighteen months or more, is not within the statute as an "agreement not to be performed within one year from the making thereof." *Clark v. Pendleton*, 20 Conn. 495. But a contract to marry within five years is within the New Hampshire statute of frauds, and should be in writing. *Derby v. Phelps*, 2 N. H. 515.

An ante-nuptial contract, whereby a woman owning lands promises a man that, if he will marry her, and will make certain improvements on the lands, she will convey the lands to him, is an agreement in consideration of marriage, which, by the Ohio statute of frauds, must be in writing. The fact that spending money upon improvements enters into the consideration does not take the case out of the statute. Nor is the marriage or the making of the improvements a part performance, such as takes the case out of the statute. *Henry v. Henry*, 27 Ohio St. 121.

§ 3. **When the contract is valid.** To prevail against a plea of the statute of frauds, the proof of an ante-nuptial agreement between the parents of the parties about to be married must be clear and positive of a contract certain and concluded. *Stoddert v. Tuck*, 4 Md. Ch. Decis. 475. To a parol agreement by a father to convey property in consideration of the marriage then contemplated of his daughter, followed by delivery of possession to the husband after the marriage, the statute of frauds cannot be set up by way of defense. Such a contract would be decreed to be specifically performed. *Surcome v. Pinniger*, 17 Eng. L. & Eq. 212; S. C., 3 De G. Mac. & G. 571; 17 Jur. 196. 22 L. J. Chanc. 419.

A marriage contract, providing for the disposition of the property of the parties to their respective heirs, is one which may be performed within a year, and therefore is not within the statute of frauds. *Houghton v. Houghton*, 14 Ind. 505.

An executed parol ante-nuptial agreement, that the husband shall have the wife's notes and bonds, and allow her the interest thereon for pin-money, is valid, and will enable the husband's representatives to defend their possession of such bonds and notes against the representatives of the wife, although the husband had not reduced them into possession by virtue of his marital rights. *Crane v. Gough*, 4 Md. 316.

§ 4. **When the contract is void.** A parol agreement that, in consideration of marriage, a woman will release a judgment she has recovered against a man, is within the statute of frauds and void, and the celebration of the marriage is not such a part performance of the contract as takes it out of the statute. *Flenner v. Flenner*, 29 Ind. 564. Marriage is not a sufficient part performance of a contract made in consideration of marriage, to take the contract out of the statute of frauds. *Brown v. Conger*, 8 Hun, 625; *Daggert v. Remerschneider*, 32 N. Y. (5 Tiff.) 629. So where, previously to a marriage, the intended husband and wife agreed in writing that the husband should have the wife's property for his life, he paying her £80 pin-money, and that she should have it after his death; and they gave instructions for such a settlement, which was prepared accordingly, when they agreed to have no settlement, the husband promising as the wife alleged to make a will giving her her property; and the marriage took place accordingly, and the husband made a will accordingly, but afterward made a different will, it was held that there had been no part performance to take the case out of the statute of frauds, which requires agreements in consideration of marriage to be in writing. *Caton v. Caton*, L. R., 1 Ch. 137; S. C., L. R., 2 H. L. 127.

A marriage contract providing for the disposition of the property of the parties to their respective heirs is one which may be performed within a year, and therefore is not within the statute of frauds. *Houghton v. Houghton*, 14 Ind. 505.

A parol agreement in contemplation of marriage, securing the intended wife's property to her separate use, and releasing her claim to dower, etc., is "on consideration of marriage," and is void under the statute. *Finch v. Finch*, 10 Ohio St. 501. And although a fraud was intended at the time of the promise, a court of chancery can give no relief. *Hackney v. Hackney*, 8 Humph. 452.

A parol ante-nuptial promise by a husband, to hold money belonging to his wife at the time of marriage as her trustee, and to invest it in

real estate in her name and for her separate use, cannot be given in evidence to sustain a post-nuptial settlement upon the wife as against creditors. *Wood v. Savage*, 2 Doug. (Mich.) 316.

In Georgia, an oral promise to settle property upon an intended wife is void. If made after marriage, it is also void for want of a consideration. *Lloyd v. Fulton*, 91 U. S. (1 Otto) 479. See *Bradley v. Suddler*, 54 Ga. 681.

ARTICLE IV.

CONTRACTS RELATING TO LAND.

Section 1. In general. A title to land by purchase can only be conveyed by deed or will. *Hetfield v. Central R. R. Co.*, 5 Dutch. (N. J.) 571; *Lingle v. Clemens*, 17 Ind. 124. But see *Thompson v. Elliott*, 28 Ind. 55. The statute of frauds does not declare parol contracts for the sale of land void, but only that no action shall be brought upon them. The vendee not in possession cannot recover possession by suit; but the vendee in possession will not be ousted on the ground of a void contract; the statute cannot be taken advantage of by the plaintiff to commit a fraud upon a defendant. *Harrow v. Johnson*, 3 Mete. (Ky.) 578.

Although an oral contract for the sale of lands is void by the statute, yet, if the buyer has complied with all the conditions of the contract, and made all the payments required by its terms, he may recover back such payments if the other party refuses to convey the land. *Jellison v. Jordan*, 68 Me. 373; *Cook v. Doggett*, 2 Allen, 439.

Though the statute speaks only of the sale of lands, yet contracts to buy land for another are equally within its operation. *Hocker v. Gentry*, 3 Mete. (Ky.) 463.

A parol agreement in respect to lands cannot be avoided in equity on the ground that it is not in writing, where it has been partly performed. *Burdick v. Jackson*, 7 Hun (N. Y.), 488. See *Borst v. Zeh*, 12 Hun, 315; *Burton v. Duffield*, 2 Bates' Ch. (Del.) 130; *Lowry v. Tew*, 3 Barb. Ch. 407. Although an oral contract for the sale of lands may be within the provisions of the statute of frauds, yet, where the purchaser goes into possession under the contract and makes valuable improvements, a court of equity, to prevent a fraud by the vendor in not conveying, will compel a specific performance of the agreement. *Burton v. Duffield*, 2 Bates' Ch. (Del.) 130; *Lowry v. Tew*, 3 Barb. Ch. 407. Vol. 5, pp. 799, 800, 801, 802. Generally part payment of the consideration money will not take a parol agreement for the purchase of real estate out of the statute of frauds. *Campbell*

v. *Campbell*, 3 Stockt. (N. J.) 268; *McGuire v. Stevens*, 42 Miss. 724; 2 Am. Rep. 649. Neither is possession, unless obtained under the contract, a part performance thereof. The acts relied on to establish part performance must be clear and definite, and referable exclusively to the contract. Possession and part payment together, under a parol agreement, take it out of the statute. *Ashmore v. Evans*, 3 Stockt. (N. J.) 151. Vol. 5, pp. 799, 800, 801.

So a purchaser of land under a verbal contract, who has made a partial payment therefor under such contract, and has entered into possession by the consent of the vendor, has such an equitable interest in the land that he may lawfully sever timber from the freehold, or peel bark from the trees thereon; and such timber and bark, when so severed from the freehold, become in law the property of the purchaser, and is subject to attachment and execution at the suit of his creditors. *Pike v. Morey*, 32 Vt. (3 Shaw) 37.

When a deed to real estate has been executed, or title has in any other way passed, subsequent agreements between vendor and vendee, as to the pecuniary liabilities growing out of the transaction, which do not take away or confer any interest in the land, but only determine the time when the purchase-money becomes due, are not affected by the statute of frauds. *Negley v. Jeffers*, 28 Ohio St. 90; *Holland v. Hoyt*, 14 Mich. 238; *Nutting v. Dickinson*, 8 Allen (Mass.), 540; *Whitbeck v. Whitbeck*, 9 Cow. 266. The Pennsylvania statute of frauds does not apply to the sale of lands out of the State. *Siegel v. Robinson*, 56 Penn. St. 19.

An executory contract for the sale of lands, after a party has entered and made valuable improvements upon the faith of the contract, cannot be rescinded by parol. *Bowser v. Cravener*, 56 Penn. St. 132; *Burton v. Duffield*, 2 Bates' Ch. (Del.) 130; *Lowry v. Tew*, 3 Barb. Ch. 407. Vol. 5, p. 800. And a written agreement for the sale of lands cannot be changed by a parol alteration of the agreement, and evidence to that effect is inadmissible. *Cook v. Bell*, 18 Mich. 387.

Parol contracts for the conveyance of land, although they afford no right of action, are available to a party in possession of the land under such contract as a defense to an action to recover the land, if the terms of the contract are clearly established and the defendant has performed or been ready to perform the contract on his part. *Cornellison v. Cornellison*, 1 Bush (Ky.), 149. But to take a case out of the statute of frauds, the parol contract must be proved by clear and satisfactory evidence. It need not be by a person who was actually present at the making of the contract, but may be sufficiently established by the acts and declarations of the grantor alone. *McGibbeny v. Burmaster*, 53 Penn. St.

332. If the alleged contract is between father and son, stronger evidence of the father's intention to part with the ownership of the property is required than to prove parol contracts between strangers in blood. *Ackerman v. Fisher*, 57 Penn. St. 457. An agreement to surrender or release a parcel of land mentioned in a contemporaneous contract is not a defeasance, but an agreement for a resale, and as clearly within the statute of frauds as an agreement to transfer any other parcel. *McEwan v. Ortman*, 34 Mich. 325.

A vendor of land cannot maintain an action to recover the purchase-money on a verbal agreement of sale. *Menson v. Kaine*, 63 Penn. St. 335; 67 id. 126. In an action on a verbal contract by the vendee against the vendor, the jury cannot give a conditional verdict to be released on the delivery of a deed. *Id.* In an action for goods sold and delivered, no recovery can be had, if it appears that the goods were delivered in pursuance of a verbal agreement that the price was to be paid by the conveyance of a specified piece of land, by the buyer to the seller, and where the buyer is ready to convey. *Galway v. Shields*, 66 Mo. 313.

To an action for goods sold, the defendant pleaded that he was possessed of a public house, and it was agreed that, in consideration that the defendant would give up possession of the same, the plaintiff would pay defendant 100*l.*, and discharge the defendant from the debt; that the plaintiff paid the 100*l.*, and the defendant quitted the house. The agreement was not in writing and it was held that having been executed it was receivable as evidence to prove the plea. *Lavery v. Turley*, 6 Hurl. & Nor. 239.

The statute of frauds does not embrace sales of lands made by a commissioner under a decree of court, and such sales are valid, though not in writing. *Watson's Admr. v. Violet*, 2 Duvall (Ky.), 332; *Warfield v. Dorsey*, 39 Md. 299; 17 Am. Rep. 562. But a sale of lands by auction is within the English statute. *Walker v. Constable*, 1 B. & P. 306; 2 Esp. 659. No action can be maintained to recover back money or property which has been paid upon a verbal contract for the purchase of land, if the vendor is willing to execute the contract on his part. *Galway v. Shields*, 66 Mo. 313; *Abbott v. Draper*, 4 Denio, 51. But it has been held that a verbal agreement for the purchase of lands, with a stipulation that money paid down may be retained as stipulated damages if the purchaser fails to complete the bargain, is void under the statute, and that the money so paid may be recovered back, even though the vendor is willing and offers to convey. *Scott v. Bush*, 26 Mich. 418; 12 Am. Rep. 311. If the vendee had taken possession of the land the rule would be otherwise. *Id.*

An oral contract between the owners of adjoining lands which

limits the use which one of the owners should make of his lot, or the manner in which he should build upon or occupy it, is within the statute and void. *Rice v. Roberts*, 24 Wis. 461; 1 Am. Rep. 195.

§ 2. **What is an interest in land.** Under a parol contract, no permanent interest in land can be acquired, nor the right at all times to enter upon it against the consent of the owner. But when the owner of an estate has by parol granted an easement therein, upon the faith of which the other party has expended money which will be lost and valueless if the right to enjoy such easement is revoked, equity will compel the owner to indemnify him on revoking the grant. *Dillon v. Crook*, 11 Bush (Ky.), 321. Though a parol contract to grant an easement in land is void; yet in certain cases the agreement will be upheld as a license. *Cayuga Ry. Co. v. Niles*, 13 Hun (N. Y.), 170.

An unexecuted verbal agreement made by a mortgagee, for a valuable consideration, to discharge a mortgage by a release, is, by the statute of frauds, void. *Leavitt v. Pratt*, 53 Me. 147; *Phillips v. Leavitt*, 54 id. 405. And see *Millard v. Hathaway*, 27 Cal. 119; *Hogg v. Wilkins*, 1 Grant's Cas. (Penn.) 67.

Sales of growing timber, if not made with a view of immediate severance, are contracts for the sale of an interest in lands and therefore within the statute of frauds. *Huff v. McCauley*, 53 Penn. St. 206; *Kingsley v. Holbrook*, 45 N. H. 313; *Hutchins v. King*, 1 Wall. (U. S.) 53; *McGregor v. Brown*, 10 N. Y. (6 Seld.) 114; *Green v. Armstrong*, 1 Denio, 550; 1 Wait's Law & Pr. 639; *Scorell v. Boxall*, 1 Y. & J. 396. But a sale of standing trees in contemplation of their immediate separation from the soil, by either the vendor or vendee, has been held to be a constructive severance of them, and they pass as chattels; and, consequently, the contract of sale is not embraced by the statute of frauds. And this though no definite time be fixed for their removal. *Byassee v. Reese*, 4 Metc. (Ky.) 372. And see *Smith v. Surman*, 4 M. & R. 455; 9 B. & C. 561; *Nettleton v. Sikes*, 8 Metc. 34; *Ellis v. Clark*, 110 Mass. 389; 14 Am. Rep. 609; *Claylin v. Carpenter*, 4 Metc. 580. The phrase, "in contemplation of immediate separation from the soil," is used to distinguish a sale of standing trees, or growing crops, which passes no interest in the land, except a license to enter upon it for the purpose of removing them, from a contract conferring an exclusive right to the land for a time for the purpose of making a profit out of the growth upon it. *Byassee v. Reese*, 4 Metc. (Ky.) 372. But contracts for the sale of standing timber are contracts for the sale of an interest in land, and, to be valid under the statute, must be in writing. *Owens v. Lewis*, 46 Ind. 488; 15 Am. Rep. 295; *Slocum v. Seymour*, 36 N. J. 138; 13 Am. Rep.

432. After the sale of growing trees by a valid deed they become personal property, and may be assigned by parol. *Kingsley v. Holbrook*, 45 N. H. 313. And it would seem that a contract to buy, cut, and carry away at the purchaser's convenience standing timber, amounts to a completed sale when the trees are cut and marked. *Wright v. Schneider*, 14 Ind. 527.

A contract for the sale of a growing crop on lands is equally, with one for the sale of standing timber within the statute of frauds. 1 Wait's Law & Pr. 639; *Carrington v. Roots*, 2 M. & W. 248; 1 Mur. & H. 14; *Rodwell v. Phillips*, 9 M. & W. 501; 1 D. (N. S.) 885; 11 L. J. Exch. 217; *Falmouth (Earl) v. Thomas*, 1 C. & M. 89; 3 Tyr. 26; *Evans v. Roberts*, 5 B. & C. 829; 8 D. & R. 611. But see *Marshall v. Ferguson*, 23 Cal. 65.

A tenant in fee of copyhold land within a manor, by the custom where trees growing on the lands were the property of the tenant in fee, having let the land to a yearly tenant, sold by parol to the defendant twenty-two specific trees then growing on the land, upon the terms that they were to be cut down by him and "got away as soon as possible," and to be paid for at a certain future day. The defendant almost immediately entered upon the land and cut down six of the trees, and sold to a third person the tops and stumps of several of the trees. The tenant in fee then gave notice to the defendant that he forbade him to enter on the land, or cut down, or carry away any of the trees, and caused the gate of the field in which the trees were, to be locked. The defendant disregarded this notice, cut down the remainder of the trees, and carried away the whole twenty-two of them, for this purpose breaking open the locked gate; and it was held, that such a contract was not a "contract for sale of lands," etc. *Marshall v. Green*, 1 L. R. C. P. Div. 35; 15 Eng. Rep. 218; 33 L. T. (N. S.) 404; 45 L. J. C. P. Div. 153; 24 W. R. 175.

Dower, before assignment, is "an interest in lands" within the statute of frauds. *Finch v. Finch*, 10 Ohio St. 501; *Lothrop v. Foster*, 51 Me. 367. So is a verbal contract for the severance of a house from the realty within the prohibition of the statute. *Hogsett v. Ellis*, 17 Mich. 351. So, too, of fixtures. *Hallen v. Runder*, 3 Tyr. 959; 1 C. M. & R. 266; *Vaughan v. Hancock*, 3 C. B. 766; 10 Jur. 926; 16 L. J. C. P. 1. Possession is an interest in land within the meaning of the statute. *Howard v. Easton*, 7 Johns. 205. So are mining claims. *Copper, etc., Co. v. Spencer*, 25 Cal. 18. But see *Gore v. McBrayer*, 18 Cal. 582. But a contract for the sale of shares in a mining company, conducted on the cost-book principle, is not a contract for the sale of land or an interest in land. *Watson v. Spratley*, 10

Exch. 222; 24 L. J. Exch. 53; *Powell v. Jessop*, 18 C. B. 336; 25 L. J. C. P. 199; *Walker v. Bartlett*, 18 C. B. 845; 2 Jur. (N. S.) 643. Coal and the right to dig them are interests in land. *Lear v. Chouteau*, 23 Ill. 39. A permanent right to flow land by the erection and maintenance of a mill-dam cannot be created by parol. *Mumford v. Whitney*, 15 Wend. 380; *Clute v. Carr*, 20 Wis. 531. A pre-emptive right is not a mere chattel interest, but requires a writing to prove the transfer, and descends to the heir. *Lester v. White's Heirs*, 44 Ill. 464. An agreement to procure a transfer of an unexpired term of a lease is a contract for the sale of an interest in lands, and must, in order to be binding, be in writing. L. R., 5 C. P. 9; *Horsey v. Graham*, 18 W. R. 141; 21 L. T. (N. S.) 539.

When a person has contracted for the purchase of land by an agreement, the terms of which are partly written and partly verbal, and has obtained possession upon performance of the written terms, an attempt to retain possession and a refusal to perform the verbal terms amounts to a fraud. *Jervis v. Berridge*, 8 L. R. Ch. 341; 5 Eng. Rep. 581; 27 L. T. (N. S.) 436.

In a suit for the specific performance of an agreement for the sale and purchase of land, if the defendant means to set up the statute of frauds as a defense, he must do so before the hearing, at which time the defense is not open to him, although he has denied the existence of the agreement altogether. *Heys v. Astley*, 4 DeG., J. & S. 34.

§ 3. **What is not an interest in land.** An agreement selling standing wood, to be cut and carried away by the purchaser, and paid for by the cord, should be classed with reference to the requirements of the statute of frauds as a contract of sale of personal property, not of an interest in lands; and, if the defendant has cut and carried away the wood, an action is maintainable for the price, although the contract was not in writing. *Green v. North Carolina R. R. Co.*, 73 N. C. 524. And see *Whitmarsh v. Walker*, 1 Metc. 313; *Killmore v. Howlett*, 48 N. Y. (3 Sick.) 569. But see *Knox v. Huralson*, 2 Tenn. Ch. 232.

A contract for the delivery of a certain number of bushels of hop roots is not an agreement relating to real estate, within the statute of frauds, although when the bargain was made they were in the ground. *Webster v. Zielly*, 52 Barb. (N. Y.) 482. Hops upon the vine are personal chattels, within the statute of frauds, and may be sold as such. *Frank v. Harrington*, 36 Barb. (N. Y.) 415.

An agreement to take a certain annual compensation for damages occasioned by flowing land by a mill-dam is not an agreement for the sale of an interest in lands within the statute. *Short v. Woodward*, 13

Gray (Mass.), 86. Neither is a contract involving the sale of real estate, which may be executed within a year, and under which the estate is conveyed. *Randall v. Turner*, 17 Ohio St. 262. Nor is an agreement to employ a person to dispose of certain real estate, and to pay him a compensation to be dependent upon the price obtained. *Fiero v. Fiero*, 52 Barb. (N. Y.) 288. Nor is a verbal license by the owner of land to do certain acts on the licensor's land. *Houston v. Laffee*, 46 N. H. 505. Nor is a parol contract to pay for the improvements upon land. *Thouvenin v. Lea*, 26 Tex. 612.

An agreement between the owner of an artificial water-course and a railroad company, whereby the former consents that the latter, in the construction of its road, may fill the channel, and divert the water into a new channel on its own land, in consideration that the railroad company will open the old channel, and restore the water thereto whenever requested, is not a contract for an interest in land within the meaning of the statute of frauds. *Hamilton, etc., Hydraulic Co. v. Cincinnati, etc., R. R. Co.*, 29 Ohio St. 341. A parol license given by the owner to a railroad company to enter upon his land and construct thereon their road is not within the statute of frauds, and is a good defense to an action of trespass against the railroad company for an entry on the land. *New Orleans, etc., R. R. Co. v. Moye*, 39 Miss. 374.

If two persons make an oral agreement by which one takes a conveyance of land which is to be held and sold by joint arrangement, the net proceeds to be divided between the two, and the property is so sold at a profit by the grantee, the other can maintain an action on the agreement for his share of the proceeds, since the part remaining to be performed is not an interest concerning lands, and therefore not within the statute. *Trowbridge v. Wetherbee*, 11 Allen (Mass.), 361.

The statute of frauds does not embrace resulting or implied trusts. *Cloud v. Ivie*, 28 Mo. (7 Jones) 578.

A contract by which parties agree to acquire land together, one furnishing the certificate, and the other the labor and expense of the surveying and procuring a patent for it, is not a contract for the purchase and sale of lands within the provisions of the statute of frauds. *Gibbons v. Bell*, 45 Tex. 417.

§ 4. **What contracts within the statute.** Wild grass growing on wild, unoccupied, uncultivated land is a part of the realty, and an attempted transfer of such grass by parol agreement is void, as a conveyance of the grass, under the statute of frauds; and where such grass was destroyed by the cattle of a third person, the owner of the land only, and not the person to whom such grass was attempted to be transferred,

can maintain an action for the destruction of the grass. *Powers v. Clarkson*, 17 Kans. 218.

An oral agreement to convey land and to take a monument, when finished, at a certain price, and the balance in money, is within the statute, and a tender of the finished monument with the money will not give a right of action for the value of the monument, or for the labor of completing it. *Dowling v. McKenney*, 124 Mass. 478. But, if the foundation for the monument was laid on the vendor's land and to his benefit, he will be liable for the labor expended. *Id.*

A verbal agreement that subsequent advances shall constitute a lien on land already conveyed as a security for former loans is within the statute of frauds, and void. *O'Neil v. Capelle*, 62 Mo. 202.

A promise, that, in consideration that the plaintiff would erect certain buildings upon the land, he should have it, has been held to be void as within the statute of frauds. *Smith v. Smith*, 4 Dutch. (N. J.) 208. But the contrary is also held. *Burton v. Duffield*, 2 Bates' Ch. (Del.) 130. See, also, *Lowry v. Tew*, 3 Barb. Ch. 407.

A tenant in common, in possession, cannot sell by parol to his co-tenant in possession, so as to pass title. *Hill v. Meyers*, 43 Penn. St. (7 Wright) 170.

Where land is conveyed with an agreement that upon a certain contingency it shall be reconveyed, no action at law can be maintained upon that agreement, unless it is in writing. *Lathrop v. Hoyt*, 7 Barb. 59. See *Redfield v. Holland Purchase Ins. Co.*, 56 N. Y. (11 Sick) 354; 15 Am. Rep. 424. But where, upon such conveyance, it is agreed that the grantee shall pay to the grantor all that he obtains upon a re-sale, over and above the sum paid upon the original conveyance, an action may be maintained upon such an agreement, though not in writing, for the balance, when the farm is re-sold for more than was paid. *Graves v. Graves*, 45 N. H. 323.

A parol agreement, whereby a man who had conveyed land to his wife, reserving to himself, by written contract, the right of possession and to re-purchase within five years, bargains to give up his right under such contract, is void under the statute. *Grover v. Buck*, 34 Mich. 519.

M. filed a bill in equity against Y., and H. alleging that Y. undertook, promised and agreed, as her agent and attorney, to attend a sale of real estate under a trust deed, and bid in one-half of the property for the complainant, who had made arrangements to obtain from H. the money to pay for such interest; and that Y., instead of doing as he promised, bought the property for himself and had title made to himself instead of to the complainant. It was held that the agreement

was within the statute and was not saved by the proviso in favor of trusts arising or resulting by implication of law, out of a conveyance of land. *Mazza v. Yerger*, 53 Miss. 135. Where a purchaser under a foreclosure sale undertakes to purchase for the benefit of the mortgagor, and thus acquires the title at a price greatly below its value, he will be deemed the trustee of the party for whom he has undertaken to purchase, and, on a tender to him of the purchase-money and interest, he will be compelled to convey the property to the party equitably entitled. *Ryan v. Dox*, 34 N. Y. (7 Tiff.) 307. See *Wheeler v. Reynolds*, 66 N. Y. (21 Sick.) 227.

Where there was a parol agreement between a mortgagor and a mortgagee and a third person that an indemnifying mortgage of real estate, held by the mortgagee, should be changed by inserting therein that such third person should also be indemnified, as surety for the mortgagor, it was held that such agreement was equivalent to an agreement to execute a new mortgage, and was within the statute, and could not be enforced by such third person. *Irwin v. Hubbard*, 49 Ind. 350; 19 Am. Rep. 679. Where title to land is asserted under an alleged parol purchase, to take the contract out of the statute, it must be supported by adequate evidence of an existing consideration, an adjustment of the boundaries of the land, and of the change of possession which the law requires. *Shellhammer v. Ashbaugh*, 83 Penn. St. 24.

A sheriff's sale of land made under an execution is within the statute of frauds, and, without a proper entry or memorandum in writing, the purchaser will not be bound. *Christie v. Simpson*, 1 Rich. 407; *Robinson v. Garth*, 6 Ala. 204; *Evans v. Ashley*, 8 Mo. 177. But see *Nichol v. Ridley*, 5 Yerg. 63.

§ 5. **What contracts not within the statute.** A parol contract between the purchaser of lands and his son, under which the latter paid the balance of purchase-money due to the vendor, as ascertained by a decree in chancery enforcing the vendor's lien, and took a deed to himself from the vendor, and received the possession from his father, who was to be allowed to retain a part of the land during his life, free of rent, is not within the statute of frauds. *White v. Smith*, 51 Ala. 405.

A verbal agreement between landlord and tenant, that the landlord shall have a lien on the tenant's crops for supplies furnished him, or a similar agreement between two tenants in common, is not obnoxious to any provision of the statute of frauds, but is valid and operative against all persons except *bona fide* purchasers without notice. *Gafford v. Stearns*, 51 Ala. 434. And compare *Scott v. White*, 71 Ill. 287.

An agreement between the parties to a previously made contract for a

sale of lands, that if, upon a survey, the tract proves larger than is called for by the contract, the purchaser shall pay an increased price, is not a contract for the sale of lands, and is not within the statute of frauds. *McConnell v. Brayner*, 63 Mo. 461.

It has been held in New York, that a judicial sale by an officer of the court is not within the statute. *Hegeman v. Johnson*, 35 Barb. 200. And see *Emley v. Drum*, 36 Penn. St. 123. An Alabama decision holds that a judicial sale is taken out of the statute after a decree of confirmation, and by virtue thereof, and not before. *Hutton v. Williams*, 35 Ala. 503. But the memorandum must be sufficient to identify the property sold or it will be invalid. *Ridgway v. Ingram*, 50 Ind. 149; 19 Am. Rep. 706.

An agreement to procure a conveyance of lands is not within the statute, and admits of proof by parol evidence. *Bannon v. Bean*, 9 Iowa (1 With.), 395.

An agreement by which the defendant's lands are to be sold to other parties at an improved value to be caused by the plaintiff's exertions, and, after sales are so made, that the complainant shall receive one-half of the proceeds, he first paying a price agreed on, and performing the acts stipulated to be performed by him to entitle him to his share of the proceeds, is not a contract for the sale of lands, and need not therefore be in writing. *Lesley v. Rosson*, 39 Miss. 368. See *ante*, p. 31, § 4. And compare *Bruce v. Hastings*, 41 Vt. 380.

An agreement to divide lands is not within the statute. *Smock v. Tandy*, 28 Tex. 130. Nor is the sale of an unlocated land certificate. *Cox v. Bray*, *id.* 247. Nor is a promise by children who received advancements in land to pay to brothers as much *pro rata* in moneys as would equalize the advancements. *Mason v. Mason*, 3 Bush (Ky.), 35. Nor is an oral promise to pay presently the price of lands conveyed at the time to the promisor. *Basford v. Pearson*, 9 Allen (Mass.), 387. A mutual transfer of possession of lands, under a parol contract, which continues exclusive and undisturbed for nineteen years, is a valid transfer of titles and is not within the statute of frauds. *Moss v. Culver*, 64 Penn. St. 414; 3 Am. Rep. 601; *Borst v. Zeh*, 12 Hun, 315.

A parol sale of lands is taken out of the operation of the statute, when it was made fairly for a valuable consideration, and possession was taken and lasting improvements made by the purchaser. *Keys v. Test*, 33 Ill. 316; *Burton v. Duffield*, 2 Bates' Ch. (Del.) 130.

Where the vendee, induced by fraudulent representations, accepts a conveyance, not including all the lands orally agreed to be conveyed, and pays the consideration and enters into possession, the statute of

frauds is not a bar to an action to compel a specific performance of the oral agreement. *Beardsley v. Duntley*, 69 N. Y. (24 Sick.) 577.

§ 6. **Memorandum required.** An agreement for the purchase and sale of real estate, not being in writing, is inoperative under the statute of frauds, unless some facts in the case, making a contrary equity, remove it out of the statute. *Junction R. R. Co. v. Harpold*, 19 Ind. 347; *Hibbard v. Whitney*, 13 Vt. 21. See *ante*, Vol. 5, p. 797. The delivery of possession, under a verbal contract for the sale of real estate, will take the case out of the statute of frauds. *Pindall v. Trevor*, 30 Ark. 249; *ante*, p. 25, Art. IV, § 1.

The legal estate in fee which remains in the mortgagor can only be divested, except by way of estoppel, by some instrument which will be valid under the statute of frauds, and in compliance with the statute prescribing the mode and manner of conveying lands. The mere payment to and receipt by the mortgagor of a sum of money, with intent to extinguish his title, will not operate as an estoppel or take the case out of the statute. *Odell v. Montross*, 68 N. Y. (23 Sick.) 499.

Where there is a valid contract for the sale of lands between two parties, the contract cannot become that of a third person without some note or memorandum in writing. *Love v. Cobb*, 63 N. C. 324. And the proceeds of the sale of land cannot be recovered in an action for money had and received, upon oral proof of the right of the plaintiff, when not evidenced by some note or memorandum in writing. *White v. Coombs*, 27 Md. 489.

A parol contract for the sale of land accompanied by a payment of part of the purchase-money has been held to constitute a valid agreement although there was a prior unstamped written memorandum. *Sykes v. Bates*, 26 Iowa, 521. But see *contra*, Vol. 5, p. 800.

Sales of real estate by an administrator are within the provisions of the statute of frauds and perjuries, and cannot be enforced, unless there is a memorandum of the sale signed by him. And the refusal by a vendor, to sign a memorandum in writing, is not a fraud, so as to take the case out of the operation of the statute of frauds. *Bozza v. Rowe*, 30 Ill. 198.

A paper stating the terms of a contract, signed by a party to be charged and addressed to a third person, though it did not at the time come to the knowledge of the other party, may be deemed as part of the sufficient memorandum of the contract required by the statute of frauds, and the fact that the latter is compelled to resort to such paper to complete the written evidence of the contract will not affect his rights in a particular in which the writings known to the parties are sufficient and definite, where there is no absolute incompatibility between

them. Where, therefore, by the written memoranda, known to the parties, the party to be charged appears as principal, the fact that such other paper shows him to have contracted for another does not prevent his being charged as principal. *Peabody v. Speyers*, 56 N. Y. (11 Sick.) 230.

§ 7. **Form and contents.** A memorandum, to take a contract out of the statute of frauds, must express all the essential terms of the contract with such certainty as to render it unnecessary to resort to parol evidence to determine the intent of the parties. *Hagan v. Domestic S. M. Co.*, 9 Hun (N. Y.), 73; Vol. 5, p. 798. It must show in some way who are the parties to the contract. *Sherburne v. Shaw*, 1 N. H. 157. The term "vendor" is not of itself a sufficient description of one of the contracting parties. *Potter v. Duffield*, L. R., 18 Eq. 4; 43 L. J. Chanc. 472; 22 W. R. 585. On a sale of real estate by auction the particulars stated that the property was put up for sale by "the proprietor." No further description of the vendor was given in the particulars or conditions. The auctioneer signed a memorandum in his own name, by which he agreed "that the vendor on his part should in all respects fulfill the conditions of sale mentioned in the particulars." On a bill for specific performance by the purchaser it was held that in the particulars and memorandum there was a sufficient description of the vendor within the statute. *Sale v. Lambert*, L. R., 18 Eq. 1; 43 L. J. Chanc. 470; 22 W. R. 478. Where an agreement for the sale of real estate did not disclose the names of the vendors, but it appeared therefrom that the vendors were a company in possession of the property offered for sale, and that they had carried on operations thereon, it was held, that the vendors were sufficiently described to satisfy the statute. *Commins v. Scott*, L. R., 20 Eq. 11; 44 L. J. Chanc. 563; 32 L. T. (N. S.) 420; 23 W. R. 498. So, too, where the conditions of sale stated that the vendors were trustees, but did not name or otherwise describe them, but the contract of sale was signed by the purchaser's agent, and confirmed by the auctioneers, as agents for the vendors, and an abstract was delivered, entitled with the names of the vendors, and the purchaser's requisitions were headed with the vendors' names, on an objection that the vendors were not named in the particulars or conditions of sale, or in the contract signed on behalf of the purchaser by his agent, it was held, that the abstract might be referred to for the purpose of curing the defect in the contract. *Bourdillon v. Collins*, 19 W. R. 556; 24 L. T. (N. S.) 344.

An agreement in writing between a subsequent purchaser of mortgaged lands and the mortgagee, for the payment of an increased rate of interest after due in consideration of an extension of time, is sufficient,

under the statute of frauds, to charge the land where no rights of third persons intervene. *Smith v. Graham*, 34 Mich. 302.

A telegram from a principal, saying he would take certain property for the purchase of which his agent had negotiated, was held *not* a sufficient memorandum to satisfy the statute where it did not express the terms of the contract, but these would have to be ascertained from the oral negotiations between the agent and the seller. *McElroy v. Buck*, 35 Mich. 434.

A paper signed by parties in possession of a lot that had been leased for ten thousand years, but without seals, agreeing "to take the lot," describing it, on a ground rent of \$60, was held to be an agreement in writing, under the statute of frauds, for a lease of the land on a ground rent. *Cudwalader v. App*, 81 Penn. St. 194.

Several writings of different dates may be read in connection to show a memorandum of an agreement under the statute. So where a contract was signed by one party and retained by the other, letters subsequently written by the latter, in which the contract was clearly referred to, are sufficient to show his assent, and that he subscribed the contract within the meaning of the statute. *Beckwith v. Tulbot*, 2 Col. T. 639; S. C. affirmed, 95 U. S. (5 Otto) 289. See *Johnson v. Buck*, 35 N. J. 338; 10 Am. Rep. 242.

A written notice to an agent to conclude a sale on certain terms, and a written agreement by a purchaser, subscribed thereon, to purchase upon those terms, constitutes a sufficient memorandum within the statute to bind the purchaser. *Forbis v. Shattler*, 2 Cin. (Ohio) 95.

An agreement was in the following words: "Mr. M. agrees to pay 625*l.* for the cottage and stables, Mr. G. paying the expenses of the lease held by Mr. S.;" and it was held that as the agreement did not describe the subject-matter of the contract with sufficient certainty, the contract was void. *Cox v. Middleton*, 2 Drew, 209; 2 Eq. 631; 23 L. J. Ch. 618. Though where a memorandum of agreement did not contain the name of the vendor, but his name was referred to in a subsequent letter written by the purchaser, it was held that this was a sufficient reference within the statute. *Warner v. Willington*, 3 Drew, 523; 2 Jur. (N. S.) 433; 25 L. J. Ch. 662.

A description of lands sold as "lots Nos. 1 and 2, on F street," without reference to any plan by which the premises could be identified, is not a sufficient memorandum under the statute of frauds. *Clark v. Chamberlin*, 112 Mass. 19. A writing in this form, "Received of A, \$100, as part payment on a piece of property on the corner of," giving street, city, county and State, and signed by the defendant, is not such

a memorandum as satisfies the statute of frauds, and will not be specifically enforced. *Holmes v. Evans*, 48 Miss. 247; 12 Am. Rep. 372.

A vendor and purchaser had agreed, by parol, upon the sale of a house at a specified price. The purchaser, by arrangement, wrote a letter to the vendor, confirming his offer, repeating the terms, and requesting a reply. The vendor's solicitor replied, stating that he was instructed to carry out the sale of the house according to the purchaser's letter, but adding, "there are some details to be embodied in a contract of sale which I will prepare and forward for your approval and signature." It was held that the latter words as to details to be embodied qualified the otherwise unconditional acceptance of the offer in the purchaser's letter, and that there was not a sufficient memorandum in writing, within the statute. *Ball v. Bridges*, 30 L. T. (N. S.) 430; 22 W. R. 552.

§ 8. **Signature.** A contract in relation to real estate, to be binding at law, must be in writing and signed by the party to be charged, or by some other person by him thereunto lawfully authorized. Vol. 5, p. 802. But, if the writing is not under seal, the authority to sign for another need not be in writing. *Blood v. Hardy*, 15 Me. 61. The language in the statute "the party to be charged therewith," means the persons who sell the land. The filing of a bill by all the owners, in the absence of a memorandum as required, with an express ratification of the contract, and a tender of title will not remedy the defect and compel the purchaser to take the land. To make the contract obligatory, it must be mutual. *Frazer v. Ford*, 2 Head (Tenn.), 464.

An agreement in the handwriting of the party, beginning "I, A. B., agree to sell," though not signed by the vendor, is good within the statute. *Knight v. Crockford*, 1 Esp. 189; *Holmes v. Mack*, 3 C. B. (N. S.) 789. See *Hubert v. Turner*, 4 Scott (N. R.), 486. But the New York statute requires that the name of the party to be charged must be *subscribed* by said party *underneath*, or *at the end* of such note or memorandum. *James v. Patten*, 6 N. Y. (2 Seld.) 9.

A contract of purchase (of leasehold property sold by auction) written on the back of the particulars of sale (which contained the names of the owners of the property), and signed by the purchaser only, is a sufficient note or memorandum of the agreement between the parties; the vendor's signature is not essential. *Laythoarp v. Bryant*, 3 Scott, 238; 2 Bing. N. C. 735; 2 Hodges, 25.

An auctioneer is an agent lawfully authorized by the buyer to sign a contract for him, whether it is for the purchase of an interest in land, or of goods. *Emmerson v. Heelis*, 2 Taunt. 38. But see *Stansfield v. Johnson*, 1 Esp. 101; *Walker v. Constable*, 1 B. & P. 306. His authority is given by the buyer bidding aloud. *Id.* And see *White v.*

Proctor, 4 Taunt. 209. And his writing down the name of the highest bidder in his book is a sufficient signature to satisfy the statute. *Id.* And it seems that a contract signed by an auctioneer on behalf of an undisclosed proprietor is a valid contract under the statute. *Beer v. London & Paris Hotel Co.*, L. R., 20 Eq. 412; 32 L. T. (N. S.) 715. But a signature by an auctioneer's clerk, in the character of witness merely, to a contract for the sale of property which is signed by the purchaser alone, is not a sufficient signing of an agreement or memorandum, or note thereof, by an agent of the seller, to satisfy the statute. *Gosbell v. Archer*, 4 N. & M. 485; 2 A. & E. 500; 1 H. & W. 31. But the signature of the purchaser to the conditions of sale when made by the auctioneer's clerk, as the bids are publicly announced, is a sufficient signature to satisfy the statute. *Johnson v. Buck*, 35 N. J. 338; 10 Am. Rep. 243.

Parol evidence cannot be admitted to show that a party having agreed for the purchase of an estate in his own name had in fact purchased it on behalf of another person. *Bartlett v. Pickersgill*, 1 Cox, 5; 4 East, 577, *n.*

The subsequent recognition of an unsigned contract in writing for the sale of lands, by the signature of his lawfully authorized agent to a notice specifying and adopting the contract, is sufficient to bind the party contracting to be charged therewith. *Norris v. Cooke*, 17 Ir. C. L. R. 37.

An agreement to sell property was signed for a company by the secretary, who was alleged to be its authorized agent. The agreement was made subject to conditions of sale, and it was alleged that the vendors therein described referred to the company. The conveyance was prepared for execution, when the company was ordered to be wound up, and the liquidator repudiated the contract, on the ground that the secretary was not an authorized agent for the purpose of sale. It was held that the allegations in the bill were sufficient to show that the secretary was the authorized agent for the purpose of executing the contract within the statute of frauds. *Beer v. London and Paris Hotel Company*, L. R., 20 Eq. 412; 32 L. T. (N. S.) 715.

§ 9. **Lease for more than one year.** An agreement for the leasing of real estate for a term longer than one year must be reduced to writing, and be subscribed by the party by whom the lease is made, or it will be void. 1 Wait's Law & Pr. 644; *Prindle v. Anderson*, 19 Wend. 391; *Phipps v. Ingraham*, 41 Miss. 256. But see *Janes v. Finny*, 1 Root, 549. The consideration of the lease should be expressed in the agreement. The agreement of the landlord to let the premises, and the

promise of the tenant to occupy and pay the rent agreed, is a sufficient statement of the consideration. 1 Wait's Law & Pr. 644.

A mere verbal or oral lease for one year is valid, although the term is not to commence until a future day. *Young v. Dake*, 1 Seld. 463; *Taggard v. Roosevelt*, 8 How. 141; *Sears v. Smith*, 3 Col. 287. When the agreement should be in writing, merely reducing it to writing will not be a compliance with the statute, unless it is subscribed by the party by whom the lease is made, or by his legally authorized agent. *Champlin v. Parish*, 11 Paige, 406.

Possession, given upon a parol lease of land, and part performance by the lessee take the case out of the statute. *Wilber v. Paine*, 1 Ham. (Ohio) 251.

An agreement connected with a contract letting lands, that the tenant will, "during the term" (three years), erect a fence, is not within the statute of frauds, for it may be performed within the first year. *Marley v. Noblett*, 42 Ind. 85.

When the lease is void by reason of the provisions of the statute, that does not render the contract an illegal or unlawful one, if the parties choose to perform it. If the lease is verbal, and the term is for a longer time than one year, it is void in the sense that neither party can compel the other to perform it. The landlord need not, in such a case, give the tenant possession of the premises, if he chooses not to do so, and no action will lie by the tenant for the refusal. So, on the other hand, the tenant may refuse to accept the possession of the premises, and no action will lie by the landlord against the tenant in consequence thereof. The parties may, however, go on and perform the agreement, although they could not be compelled to do so. And in such case, if the tenant goes into possession of the demised premises and occupies them, he will then be bound to perform the agreement, by paying the rent agreed, for such time as he may remain in possession, in the same manner as though the lease had been reduced to writing. *Schuyler v. Leggett*, 2 Cow. 660; 1 Wait's Law & Pr. 645. And during the time which the tenant occupies the premises under the terms of such parol agreement, he will be bound to perform the terms of it on his own part. Id. Although a tenancy from year to year is ordinarily implied in favor of the owner against one who enters under a parol demise for a term of years, void by the statute of frauds, yet if the entry is under an agreement by the owner to execute a valid lease in writing for the term, and he afterward, in bad faith, refuses to execute it, repudiates the relation of landlord and tenant, and within the year resumes dominion over the property, he is bound by his election, and has no remedy

on an implied agreement for intermediate use and occupation. *Greton v. Smith*, 33 N. Y. (6 Tiff.) 245.

The defendant having proposed to take a lease of certain premises, for the term of seven years, a draft lease was prepared, to which the defendant made some objections. He ultimately took it away to be settled by his solicitors. Defendant's solicitors returned the draft to the plaintiff's solicitors, with the following letter: "We have seen our client and have altered the draft lease in accordance with his instructions. We trust there will be no impediment to prevent an early completion, and shall be glad to receive the draft as soon as you can, that we may engross the counterpart." The plaintiff's solicitors replied, returning the draft and engrossment of lease, and counterpart, stating that, according to the practice, where there is no stipulation on the subject, the lessor's solicitor invariably prepares both lease and counterpart. It was held that there was no evidence of any contract binding the defendant to take the lease, and no memorandum of any contract sufficient for the purpose within the statute. *Forster v. Rowland*, 7 Hurl. & Nor. 103.

§ 10. **Leases for one year.** A parol lease from the owner is a perfectly good defense to any proceedings summarily to eject the lessee, or to recover the possession of the premises. *Supp v. Keusing*, 5 Rob. (N. Y.) 609.

When one enters upon and occupies lands with the consent of the owner, under a parol lease for more than one year, and so void under the statute of frauds, the occupation inures as a tenancy from year to year, the agreement regulates the relations of the parties, and may be resorted to to determine their rights and duties in all things consistent with a yearly tenancy. *Reeder v. Sayre*, 70 N. Y. (25 Sick.) 180. And see *Thomas v. Nelson*, 69 N. Y. (24 Sick.) 118.

ARTICLE V.

OF CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR.

Section 1. In general. That part of the statute of frauds, which requires agreements not to be performed within a year to be in writing and signed, does not apply to cases in which the performance may, by possibility or accident, be extended beyond that period; it is to be confined to cases where the agreement is not to be performed, and cannot be carried into execution within that space of time. *Ridley v. Ridley*, 34 Beav. 478; 11 Jur. (N. S.) 475; 34 L. J. Chanc. 462; 13 W. R. 763; 12 L. T. (N. S.) 481; *Wiggins v. Keizer*, 6 Ind. 252; *Russell v.* Vol. VII.—6

Stale, 12 Conn. 455. The statute includes only such agreements as, fairly and reasonably interpreted, do not contemplate a valid execution within the space of a year from the making. If, by possibility, an agreement may, by its terms, be executed within that time, it is not within the statute. An agreement or promise, therefore, the performance of which is contingent upon the duration of human life, is not within the statute, because by the death of the person within one year upon the happening of which the performance is to take place, a valid performance may be had within that time according to the very terms of the contract. The fact that the performance may thus, by possibility, be required within the year, relieves the contract from the operation of the statute. *Jilson v. Gilbert*, 26 Wis. 637; 7 Am. Rep. 100; *Thouvenin v. Lea*, 26 Tex. 612; *Blanchard v. Weeks*, 34 Vt. (5 Shaw) 589. Therefore, where A agreed by parol for a valuable consideration to leave C a certain amount by his will, and he died fourteen years after the agreement, it was held that the statute did not apply. *Ridley v. Ridley*, 34 Beav. 478; *Quackenbush v. Ehle*, 5 Barb. 469; *Robinson v. Raynor*, 28 N. Y. (1 Tiff.) 494; *Reynolds v. Robinson*, 64 N. Y. (19 Sick.) 589. And see *Wells v. Horton*, 12 Moore, 176; S. C., 4 Bing. 40; *Fenton v. Emblers*, 3 Burr. 1278; S. C., 1 W. Bl. 353. Where it does not appear from the pleadings, or the evidence, that a contract was not to be performed within a year, the fact that performance was delayed for more than a year, will not bring the contract within the statute of frauds. *Soggins v. Heard*, 31 Miss. (2 George) 426; *Suggett v. Cason*, 26 Mo. (5 Jones) 221. When the consummation of the contract depends upon the election of a party, which may happen within a year, the contract is not within the statute. And even when the contract in terms extends beyond one year, if the obligation to pay on one side depends upon a use conceded by the other, the party who has enjoyed such use for a succession of years, cannot defeat an action for the stipulated compensation for that time on the ground of the statute of frauds. *Sherman v. Champlain Trans. Co.*, 31 Vt. (2 Shaw) 162. But a contract for service for more than a year, but subject to determination within the year on a given event, is within the statute, and must therefore be in writing. *Dobson v. Collis*, 1 H. & N. 81. See *Wilson v. Ray*, 13 Ind. 1. The statute of frauds does not make the agreements therein mentioned void, but only prevents their being enforced by action, if its requirements are not complied with. Therefore, an action cannot be maintained upon a parol agreement, which is not to be performed within a year, although made in France, and valid and enforceable there. *Leroux v. Brown*, 12 C. B. 801; 14 Eng. Law & Eq. 247.

§ 2. When the contract is not to be performed within a year.

A contract for a year's service to commence at a subsequent day is a contract not to be performed within the year, and must be in writing; therefore, no action can be maintained for the breach of a verbal contract made on the 27th of May, to commence on the 30th June following. *Bracegirdle v. Heald*, 1 B. & A. 722. And see *Snelling v. Huntingfield (Lord)*, 1 C., M. & R. 20; 4 Tyr. 606; *Scoggin v. Blackwell*, 36 Ala. 351; *Nones v. Homer*, 2 Hilt. (N. Y.) 116; *Kelly v. Terrell*, 26 Ga. 551; *Comstock v. Ward*, 22 Ill. 248. But a contract of hiring made on the 24th of March, for a year's service, to commence on the 25th, is not void by the statute for the want of a memorandum. *Cawthorne v. Cordrey*, 13 C. B. (N. S.) 406; 32 L. J. C. P. 152; *Dixon v. Frisbee*, 52 Ala. 165; 23 Am. Rep. 565.

An agreement to work for two years, for \$100 the first, and \$200, the second year, is within the statute of frauds, and the execution of the agreement upon one side does not take it out of the statute. *Emery v. Smith*, 46 N. H. 151; *Ellicott v. Peterson*, 4 Md. 476. An oral agreement made December 14, 1856, to rent a house for the year 1857, is within the statute of frauds. *Atwood v. Norton*, 31 Ga. 507. A verbal contract between the lender and borrower, that money loaned is to be repaid when nut-bearing trees about to be planted on the borrower's farm, yield an income sufficient to pay the same, over and above paying the expenses of the farm, and of the borrower's family, is void under the statute, because the parties must have contemplated that more than one year would elapse before the time of payment would arrive. *Swift v. Swift*, 46 Cal. 266.

An oral agreement to pay money after the lapse of a year, for land to be presently conveyed, is within the statute. *Marcy v. Marcy*, 9 Allen (Mass.), 8.

A promise by a third person to a father that if he will give his infant son a specified name that he, the promisor, will deposit in a specified savings bank the sum of one hundred dollars in four equal annual installments until all are paid, is within the statute and void. *Parks v. Francis*, 50 Vt. 626.

In an action by a minor to recover for work and labor, the defendant cannot avail himself of an oral contract with the plaintiff's mother for the plaintiff's services on certain terms, until he became of age. The contract, not being in writing, is not a contract of apprenticeship, and is void by the statute as not to be performed within a year. *Tague v. Hayward*, 25 Ind. 427. But an agreement by an infant to work seven years for his board is not within the statute. *Wilhelm v. Hardman*, 13 Md. 140. A contract for the maintenance of a child at the

defendant's request, to inure "so long as the defendant shall think proper," is a contract upon a contingency, the performance of which is not necessarily within the statute. *Souch v. Strawbridge*, 2 C. B. 808; 10 Jur. 357; 15 L. J. C. P. 180; *Ellicott v. Peterson*, 4 Md. 476.

The statute of frauds is no bar to an action for the conversion of cattle intrusted to the defendant under an oral contract to keep the cattle several years for a compensation. *Moore v. Aldrich*, 25 Tex. (Supp.) 276.

A contract to pay for a right to use an invention on a certain boat, "at so much a year during the term of a patent, having twelve years to run," if the boat should so long last, is within the statute. *Packet Co. v. Sickles*, 5 Wall. (U. S.) 580.

Where A delivered to B ten sheep, on condition that, at the end of four years, B should deliver back twenty sheep of the same quality, and at the expiration of four years, the parties made another agreement, by which the defendant, instead of delivering the twenty sheep then due, promised to deliver forty of equal quality at the end of four years more, this latter agreement was held to be within the statute. *Bartlett v. Wheeler*, 44 Barb. 162. A verbal agreement by a tenant in possession under a sealed lease, having at the time several years to run, that he will leave certain temporary buildings put by him on the premises, in consideration of being released from part of the rent, is void by the statute. *Lawrence v. Woods*, 4 Bosw. (N. Y.) 354.

An agreement, which is void in part under the statute of frauds, is not necessarily void *in toto*. *Rand v. Mather*, 11 Cush. (Mass.) 1. But see *ante*, p. 5, Art. 1, § 2.

Six persons signed a document, purporting to be the basis of a partnership to last for three years and to commence at a subsequent date. By the terms of the document the interest in the partnership was to be divided into 36 shares of which each was to receive a certain number. On signing the document one of their number wrote before his signature the words "excepting clause as to shares." On an action by one of the others for a breach of the terms of the document, it was held that, as the document set forth an agreement not to be performed within a year, within the statute, and that, as there was no complete agreement in writing, signed by the parties to be charged thereby, no action would lie for a refusal to perform the terms of the document. *Tomkins v. Randell*, 19 W. R. 413.

A parol agreement to maintain a child known to be about five years old until she is able to do for herself, is an agreement not to be performed

within a year within the meaning of the statute, although determinable within the year by the happening of a collateral event. *Farrington v. Donohue*, 1 Ir. C. L. 675; 14 W. R. 922. If it appears to have been the understanding of the parties to a contract at the time, that it was not to be completed within a year, though it might, and was in fact in part performed within that time, it is within the statute; and if not in writing signed by the party to be charged, it cannot be enforced against him. *Boydell v. Drummond*, 11 East, 142; 2 Camp. 157. An agreement to enter into partnership for ten years must be in writing. *Williams v. Jones*, 7 D. & R. 548; S. C., 5 B. & C. 108.

§ 3. **When it may be performed within the year.** A contract which, by its terms, is to be performed at the death of one of the parties, is not within the provision of the statute of frauds which requires contracts not to be performed within a year from the making thereof to be in writing. *Frost v. Tarr*, 53 Ind. 390; *Kent v. Kent*, 62 N. Y. (17 Sick.) 560; 20 Am. Rep. 502; *Riddle v. Backus*, 38 Iowa, 81; *Updyke v. Ten-Broeck*, 3 Vroom (N. J.), 105; *Hutchinson v. Hutchinson*, 46 Me. 154; *Blanding v. Sargent*, 33 N. H. 239. Where a contract by its terms may be performed within one year, and it was within the contemplation of the parties that such a contingency was not only possible but probable, the case is not within the statute of frauds. *Southwell v. Beezley*, 5 Oreg. 143; id. 458. And see *ante*, pp. 41, 42, § 1. But to exclude evidence not in writing to prove a contract, on the ground that it is not to be performed within a year from the making thereof, the contract must show, either by express terms, or necessary implication, that its performance within the year is prohibited, or impossible. *Blair, etc., Land Co. v. Walker*, 39 Iowa, 406. See *Larimer v. Kelley*, 10 Kans. 298. A verbal contract "to continue as long as the parties are mutually satisfied" is not within the statute, as it might be performed within one year. *Greene v. Harris*, 9 R. I. 401. So of an agreement to print and sell the products of H.'s mill, "to continue two years or longer, if necessary, until H. made the net profit of \$50,000." *Hodges v. Richmond Manuf. Co.*, 9 R. I. 482. A parol contract not to carry on a trade in a certain village is not within the statute, as it may be wholly performed within one year by the death of either party. *Richardson v. Pierce*, 7 R. I. 330; *Blanchard v. Weeks*, 34 Vt. (5 Shaw) 589; *Worthy v. Jones*, 11 Gray (Mass.), 168. An agreement made in consideration of a deed of land, to pay a debt of the grantor, need not be in writing, although not to be performed within a year. *Berry v. Doremus*, 1 Vroom (N. J.), 399. See *Sobey v. Brisbee*, 20 Iowa, 105. An agreement that cattle, delivered by one of the parties to the other, shall continue to be the

property of the former until paid for, may be performed within a year, and therefore is not invalid under the statute. *Esty v. Aldrich*, 46 N. H. 127; *Grant v. Pendery*, 15 Kans. 236. An oral promise made by an inventor to a capitalist to obtain letters patent for an invention, the agreement not appearing to be impossible of performance within a year, is not within the statute of frauds. *Somerby v. Buntin*, 118 Mass. 279; 19 Am. Rep. 459. An agreement that a policy of fire insurance shall be renewed from year to year, either party being at liberty to give notice at any time that the arrangement shall not be continued, is not within the statute. *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. (5 Smith) 305.

An agreement to hire a carriage for more than one year, determinable by the custom of the trade, at any time, upon payment of a year's hire, is an agreement not to be performed within one year from the making thereof, and must be signed by the party to be charged therewith. *Burch v. Liverpool (Earl)*, 4 M. & R. 380; 9 B. & C. 392.

§ 4. **Part performance.** In order to take a case out of the operation of the statute, on the ground that it is partly performed, there must be such a part performance of it on the part of plaintiff, as would render it a fraud on him, if the defendant refused to comply with the contract on his part. *Burnett v. Blackmar*, 43 Ga. 569. See *Herrin v. Butters*, 20 Me. 119. Payment or performance of the consideration of an agreement, not to be performed within the year of the statute of frauds, never takes it out of the statute. Nor can the consideration be recovered unless it inured to the defendant's advantage. *Pierce v. Paine*, 28 Vt. 34.

Although an action at law does not lie for the breach of a contract, which is void by the statute of frauds because not in writing, still an action will lie to recover for services performed under the contract. *Nones v. Homer*, 2 Hilt. 116; *Sims v. McEwen*, 27 Ala. 184; *Ray v. Young*, 13 Texas, 550; *Cawthorn v. Cordrey*, 13 C. B. (N. S.) 406.

Where a mortgagee, having obtained a decree of foreclosure upon two parcels of land, made an oral contract with a junior mortgagee, at the time of the sale under the decree, that he would bid the amount due him on one parcel, and if it was not redeemed, the junior mortgagee should have the other parcel discharged from the lien of the prior mortgagee, for his notes not yet due, and the junior mortgagee was to pay the costs of foreclosure and one-half of the solicitor's fees, it was held that this agreement being executed, as between the parties within the year, was thereby taken out of the operation of the statute. *Bennett v. Matson*, 41 Ill. 332.

The building of a party-wall under a parol agreement that the ad-

adjacent owner will pay for one-half as much as he shall use, when he builds, is a part performance taking the case out of the statute. *Rawson v. Bell*, 46 Ga. 19. See Vol. 2, pp. 722-725.

A promise, upon which the statute declares that no action shall be maintained, cannot be made effectual by estoppel merely because it has been acted upon by the promisee and not performed by the promisor. *Brightman v. Hicks*, 108 Mass. 246.

The doctrine, that an agreement that mutual debts shall be applied in satisfaction of each other, will not constitute a payment such as will save an oral agreement from the statute of frauds. *Mattice v. Allen*, 3 Abb. (N. Y.) App. Dec. 248; 3 Keyes, 492; 3 Trans. App. 263; See *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. (20 Sick.) 6.

Where a parol contract was made in November, 1865, for the rent of a plantation for the year 1866, and the defendant went into possession of the place in pursuance of the contract and cultivated it for the year, 1866, this is such a part performance of the contract as will take it without the operation of the statute of frauds in an action brought for the rent. *Rosser v. Harris*, 48 Ga. 512.

§ 5. **Performance on one side.** If one of the mutual promises is executed, or is to be performed within the year, the case is not within the statute of frauds, and a memorandum of the other is not necessary to render it capable of enforcement. The provision of the statute, relative to contracts not to be performed within a year, applies to contracts not to be performed on either side within the year. *McClellan v. Sanford*, 26 Wis. 637 (in this case many conflicting decisions are reviewed); *Haugh v. Blythe*, 20 Ind. 24; *Allen v. Devlin*, 6 Bosw. (N. Y.) 1; *Pinney v. Pinney*, 2 Root, 191. In Vermont, the question whether the statute of frauds applies to a verbal contract, to be performed within a year by one party and not by the other, depends on whether the suit is brought against the party who was to perform his part within the year; if so brought, the statute would not apply, but if brought against the party, whose agreement was not to be performed within the year, the statute would be a bar. *Sheehy v. Adarene*, 41 Vt. 541.

In a suit against an executor upon a parol agreement of his testator to leave a certain sum by will to the plaintiff, if he continued to work for the testator until his death, it was held that the agreement was not within the statute, as it had been performed by the plaintiff, and because it might have been performed within a year. *Bell v. Hewitt's Executor*, 24 Ind. 280; *ante*, p. 41, 42, Art. 5, § 1.

An agreement whereby all that is to be done by the plaintiff, constituting one entire consideration for the defendant's promise, is capable

of being performed within a year, and no part of what the plaintiff is to do constituting such consideration is intended to be postponed until after the expiration of the year, is not within the statute, notwithstanding the performance on the part of the defendant is or may be extended beyond that period. *Smith v. Neale*, 2 C. B. (N. S.) 67; 3 Jur. (N. S.) 516; 26 L. J. C. P. 143; *Blanding v. Sargent*, 33 N. H. 239.

§ 6. **Recovery for services under void contract.** Although no suit can be maintained to enforce a parol agreement to return at the expiration of three years certain corn and pork loaned, one can be maintained to enforce the implied promise created by law to pay the value of the articles received and not returned. *Montague v. Garnett*, 3 Bush (Ky.), 297. And under that clause of the statute of frauds, which provides that "no action shall be brought" upon an oral agreement not to be performed within one year from the making thereof, such an agreement for services cannot be set up in defense to an action on a *quantum meruit* for services performed under it. *King v. Welcome*, 5 Gray (Mass.), 41.

If a party makes a contract to labor for a fixed period, which is void within the statute of frauds, and quits before that period has elapsed, without any sufficient cause, or for any cause which he has provoked, he cannot recover for the time he has labored. *Swansey v. Moore*, 22 Ill. 63. But see *Shute v. Dorr*, 5 Wend. 204. So, where a party enters into a verbal agreement to work for another for a number of years for a certain compensation, to be paid at the end of the time specified, and fully performs such contract on his part, he cannot repudiate such contract, on the ground that it was void under the statute of frauds, and maintain an action to recover the value of the services rendered; he can only recover the compensation agreed upon. *Van Valkenburg v. Croffut*, 15 Hun (N. Y.), 147.

§ 7. **Executed contracts.** A parol agreement within the statute of frauds having been executed, neither of the parties can afterward object that the contract was void. *McCue v. Smith*, 9 Minn. 252; *Craig v. Van Pelt*, 3 J. J. Marsh. 489; *Noyes v. Moor*, 1 Root, 142. So, where a contract, by which one party was to build a dam and the other to pay therefor in certain installments, was signed only by the first party, but it appeared that the other party paid his installments as therein provided, and both acted upon it as binding, it was held that it was executed and binding. *Reedy v. Smith*, 42 Cal. 245.

Certain county bonds were deposited with a provost marshal, at his requirement, by a person engaged in furnishing men to fill the quotas of certain towns for military service, under a parol agreement that the

bonds should be held as security that the men furnished by him should not desert before reaching the place of rendezvous. It was held that the agreement was void, under the statute of frauds, it being an agreement to answer for the default or miscarriage of another; and that it was not so far executed, by the delivery of the securities, as to give the officer an interest in, or a right to retain them. *Richardson v. Crandall*, 48 N. Y. (3 Sick.) 348.

The father of seven illegitimate children agreed with their mother verbally to pay her £300 per annum, by equal quarterly installments, for so long as she should maintain and educate them. At the time of making the promise the eldest child was about fourteen years old. For several years the mother maintained and educated the children, and the father paid the agreed sums. At Michaelmas, 1870, he discontinued his payments. The mother still continued to maintain and educate the children, and in May, 1873, brought an action for two and a half years' arrears. It was held that the consideration being executed, she was entitled to recover as for "money paid at the father's request," at the rate fixed by the verbal agreement, even assuming that the agreement was one "not to be performed within a year." *Knowlman v. Bluett*, L. R., 9 Exch. 307; 10 Eng. R. 466; 22 W. R. 758; 43 L. J. Exch. 151.

ARTICLE VI.

CONTRACTS FOR THE SALE OF GOODS.

Section 1. In general. See *ante*, Vol. 5, chapter on *Sales*, at page 589, *et seq.*, for a full statement of the general principles.

§ 2. **What are goods?** See *ante*, Vol. 5, pp. 591, 595.

§ 3. **What are not goods?** *Id.* The statute of frauds does not apply to a verbal contract for the manufacture and delivery of articles. *Hight v. Ripley*, 19 Me. 137. If the articles exist at the time, in the condition in which they are to be delivered, it should be regarded as a contract of sale; but if labor and skill are to be applied to existing materials, as a contract for the manufacture of the articles. So, an agreement "to furnish, as soon as practicable," a certain number of malleable hoe shanks, agreeable to patterns left, is a contract for the manufacture of such articles. *Id.* So, too, where one agreed to buy a certain quantity of hop roots from such persons as he could find having them for sale, and deliver them to another at six dollars per bushel, it was held that this might be considered a contract for work and labor to be done and performed, and so not within the statute of frauds. *Webster v. Zielly*, 52 Barb. 482. See *Parsons v. Loucks*, 48 N. Y. (3 Sick.) 17; 8 Am.

Rep. 571; *Goddard v. Binney*, 15 Mass. 450; 15 Am. Rep. 112, 118, *n.* A contract for the sale of corn, if by its terms the corn is to be gathered and shucked before delivery, is not within the statute. *Rentch v. Long*, 27 Md. 188. And see *ante*, Vol. 5, at pages 594, 595.

§ 4. **Articles to be made, etc.** See *ante*, Vol. 5, pp. 591–595

§ 5. **Of the price.** See *ante*, Vol. 5, pp. 596, 597.

§ 6. **Acceptance and receipt of goods.** See *ante*, Vol. 5, pp. 598–601, where the subject is fully treated.

§ 7. **What is a sufficient acceptance.** The plaintiff contracted, by parol, to sell, and the defendant to purchase one thousand cords of wood, or so much thereof as the plaintiff could cut and deliver at a specified price per cord, no time being fixed for the performance. Plaintiff delivered and received pay for about three hundred and twenty-two cords and had about two hundred cords more ready for delivery; this he commenced to draw and had piled nineteen cords by the side of defendant's road when he saw notified not to bring more, that defendant did not want it, and he refused to pay for the nineteen cords. In an action to recover damages, it was held that the partial delivery and acceptance answered the requirements of the statute of frauds, and rendered the contract valid. *Van Woert v. Albany & Susquehanna R. R. Co.*, 67 N. Y. (22 Sick.) 538.

There may be an actual receipt of goods without an acceptance, and an acceptance without a receipt. The receipt of the goods is the act of taking possession of them. When the seller gives to the buyer the actual control of the goods and the buyer accepts such control, he has actually received them. Such a receipt is often an evidence of an acceptance, but it is not the same thing. Indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. Blackb. on Sales, 106. See *Brand v. Föcht*, 3 Keyes, 409; *Stone v. Browning*, 51 N. Y. (6 Sick.) 211.

It may be that in the case of a contract for the purchase of unascertained property to answer a particular description, no acceptance can be properly said to take place before the purchaser has had an opportunity of rejection. In such a case the offer to purchase is subject not only to the assent or dissent of the seller, but also to the condition that the property to be delivered by him shall answer the stipulated description. A right of inspection to ascertain whether such condition had been complied with is in the contemplation of both parties to such a contract, and no complete and final acceptance, so as irrevocably to vest the property in the buyer, can take place before he has exercised or waived that right. In order to constitute such a final

and complete acceptance, the assent of the buyer should *follow*, not *precede* that of the seller. But where the contract is for a specific ascertained chattel, the reasoning is altogether different. Equally where the offer to sell and deliver has been first made by the buyer and afterward assented to by the seller, the contract is complete by the assent of both parties, and it is a contract the expression of which testifies that the seller has agreed to sell and deliver, and the buyer to buy and accept the chattel (*Bog Lead Co. v. Montague*, 10 C. B. [N. S.] 481, 489, 490; quoted in *Cooke v. Millard*, 65 N. Y. [20 Sick.] 352, 369; 22 Am. Rep. 619); where the authorities on "acceptance" are collated and reviewed.

§ 8. **What not a sufficient acceptance.** See *ante*, Vol. 5, pp. 598-601. The defendants, desiring to purchase a bill of lumber, went to the plaintiff's yard where they were shown lumber of the desired quality but which, to meet their requirements, needed to be dressed and cut into different sizes. They gave a verbal order for certain quantities and sizes, amounting, at the prices specified, to \$918.22, to be taken from the lots examined by the defendants. There was a much larger quantity of lumber in the yard, and no particular lumber was selected or set apart to fill the order. It was the defendant's intention to purchase enough to fill out a boat load. After giving the order the defendants pointed out the piles from which they desired the lumber to be taken, and directed that when prepared it should be placed upon the plaintiff's dock and notice given of readiness to deliver. Plaintiffs filled the order, placed the lumber on their dock and gave notice as agreed. It was not removed and the next day it was destroyed by fire. In an action to recover the contract price, it was held that the contract was in its nature entire, and, though executory, was one of sale within the meaning of the statute of frauds; that the subsequent acts of the defendants did not turn the executory contract into an executed one, and did not amount to an "acceptance and receipt" of the lumber so as to take the case out of the statute; that the title to the lumber, therefore, never became vested in the defendants, and they were not liable. *Cooke v. Millard*, 65 N. Y. (20 Sick.) 352-374; 22 Am. Rep. 619. In an action for goods sold and delivered, if the seller relies upon an acceptance by the buyer to take the case out of the statute, he must show some unequivocal act of acceptance, and if the goods were sold by sample, it is not enough to merely show that the goods came into the possession of the buyer and that they corresponded with the sample. *Remick v. Sandford*, 120 Mass. 309; Vol. 5, pp. 579, 599.

§ 9. **Of earnest and part payment.** See *ante*, Vol. 5, pp. 601-603.

§ 10. **When sufficient.** Id.

§ 11. **When not sufficient.** Id.

§ 12. **Memorandum in writing.** See *ante*, Vol. 5, pp. 603–606. A memorandum in writing representing the sale of a quantity of whisky to be ascertained by a redip is not sufficient to satisfy the statute. *Mahalen v. Dublin & Chapelizod Dis. Co.*, 11 Ir. C. L. 83.

The written evidence of a contract, necessary to satisfy the statute of frauds, must be in existence at the time of bringing the action on such contract. *Bird v. Munroe*, 66 Me. 337; 22 Am. Rep. 571.

§ 13. **Form and requisites of memorandum.** The memorandum required by the statute must contain all the essential terms of the contract, expressed with such a degree of certainty as to render it unnecessary to resort to parol evidence to determine the intent of the parties thereto. *Hagan v. Domestic Sewing Machine Co.*, 9 Hun (N. Y.), 74.

§ 14. **Signature.** See *ante*, Vol. 5, pp. 606–608; *infra*, p. 38, Art. 4, § 8. The mere circumstance of the name of a party being written by himself in the body of a memorandum of agreement will not of itself constitute a signature. It must be inserted in such a manner as to govern or to have the effect of authenticating the whole instrument. You cannot by words of reference bring up a signature, and give it a signification and effect different from that which the signature has in the original place where it is found. *Caton v. Caton*, L. R., 2 H. L. Cas. 127; 36 L. J. Chanc. 886; 16 W. R. 1. Where, therefore, the name of the party against whom specific performance in equity was sought to be enforced, appeared in different parts of the paper, but only in such a way that, in each case, it merely referred to the particular part where it was found, and that part was in the form of reference or description, and not of a promise, or an undertaking, it was held, that the paper did not constitute a contract signed within the provisions of the statute of frauds. Id. But it has been held that a signature to a document which contains the terms of a contract is available to satisfy the statute, though put *alio intuitu*, and not in order to attest or verify the contract. *Jones v. Victoria Graving Dock Co.*, L. R., 2 Q. B. Div. 26; 46 L. J. Q. B. 219; 25 W. R. 348.

A signature by initials to a contract or a memorandum is sufficient. *Palmer v. Stephens*, 1 Denio, 471; *State v. Bell*, 65 No. Car. 313; *Chichester v. Cobb*, 14 L. T. (N. S.) 433.

§ 15. **Auctioneer's note or entry.** See *ante*, Vol. 1, pp. 485–487; Vol. 5, pp. 606–608; *infra*, p. 38, Art. 4, § 8.

An auctioneer's memorandum, to be sufficient within the statute of frauds, must set out the contract with such reasonable certainty, that

its terms may be understood from the writing itself, without recourse to parol proof. The fact that such memorandum is indorsed on the order of sale, but without any reference to it for the ascertainment of the things sold, is no better than if indorsed on any other paper. *Ridgway v. Ingram*, 50 Ind. 145; 19 Am. Rep. 706. It must be one which contains, expressly or by necessary implication, all the material terms of the contract. A draught of a deed poll, to be executed by the grantors and which does not contain the purchaser's obligations, is not sufficient; still less is such a draught which is only partly completed at the time when the purchaser revokes his bid. *Gwathney v. Cason*, 74 No. Car. 5; 1 Am. Rep. 484.

Only the parties to a sale can take advantage of any defects or irregularities in the memorandum made by the auctioneer, and if they complete the sale without objection, by payment of the purchase-money and execution and acceptance of a deed, it does not lie in the mouth of the mortgagor whose lands were thus sold under a power contained in the mortgage, when sued by the purchaser, to object to the sufficiency of the memorandum made by the auctioneer, or to the fact that the mortgagee's agent acted as auctioneer at the sale. *Lewis v. Wells*, 50 Ala. 198. In an action against an auctioneer upon a contract of sale, where the defense is that the contract was by parol, and so void under the statute of frauds, the fact that the law imposes upon auctioneers the duty of making memoranda of sales made by them, and the presumptions in favor of the performance of official duty, cannot stand for proof that there was a written contract of sale. *Baltzen v. Nicolay*, 53 N. Y. (8 Sick.) 467.

§ 16. **Statement of consideration.** Contracts, required by the statute of frauds to be in writing, stand upon the same footing as other written contracts, with respect to the consideration, which need not be expressed in the writing, but may be proved, when necessary, or disproved by parol or other evidence; and this whether the consideration be executed or executory. *Steadman v. Guthrie*, 4 Metc. (Ky.) 147; *Shively v. Black*, 45 Penn. St. 345; *Valpy v. Gibson*, 4 C. B. 837; *Spicer v. Cooper*, 1 G. & D. 52; 5 Jur. 1036; 1 Q. B. 424; *Ashcroft v. Morrin*, 4 M. & G. 450; 6 Jur. 783. The words "for value received" in a contract sufficiently express the consideration within the requirements of the statute of frauds. *Howard v. Holbrook*, 9 Bosw. (N. Y.) 237. There may be a complete contract, so as to pass the property in goods from the seller to the buyer, although the price has not been definitively agreed on between them. *Joyce v. Swann*, 17 C. B. (N. S.) 84. Where an executory contract is entered into for the fabrication of goods, without any agreement as to price, the memorandum

of the contract required by the statute is sufficient without the specification of price. *Hoadley v. MacLaine*, 10 Bing. 482; 4 M. & S. 340.

But it has been held that where the contract is within the statute of frauds and is executory, the memorandum must name the price, as well where a reasonable price is agreed upon as where any other is, and if the price is left to be arranged by parol, the memorandum will be incomplete. *James v. Muir*, 33 Mich. 223. And see *Elmore v. Kingscote*, 8 D. & R. 343; 5 B. & C. 583. A letter admitting the purchase of goods by the writer from the person to whom it is written, but without expressing any consideration, or stating the terms of the purchase, is not a sufficient note or memorandum in writing to take the case out of the operation of the statute of frauds. *Newbery v. Wall*, 65 N. Y. (20 Sick.) 484.

§ 17. **Construction of contracts.** A sale of any growing produce of the earth, in actual existence at the time of the contract, whether it be in a state of maturity or not, is not a sale of an interest in land. A parol contract for the sale of the peaches growing in a peach orchard, for a specified sum, to be gathered as they ripen, is valid. *Purner v. Piercy*, 40 Md. 212; 17 Am. Rep. 591.

In a contract to sell five hundred bales of cotton, to arrive in Liverpool, per ship or ships from Calcutta, there was the following stipulation: "The cotton to be taken from the quay," and it was held that this stipulation was an independant stipulation for the seller's benefit, and not a condition precedent which the purchaser had a right to insist on being performed. *Neill v. Whitworth*, L. R., 1 C. P. 684; 12 Jur. (N. S.) 761; 35 L. J. C. P. 304; 14 W. R. 844; 1 H. & R. 832.

For the construction of other contracts, see illustrations under previous sections, and Chapter on Sales.

ARTICLE VII.

REMEDIES.

Section 1. In general. A parol contract within the provisions of the statute of frauds cannot be made the ground of a defense. *Wheeler v. Frankenthal*, 78 Ill. 124. And where the time of performance of a written contract, which is within the statute of frauds, is extended by parol, the action can be maintained only on the written contract, and such parol extension is no defense to such an action, if the defendant has not performed, or offered to perform, within the time as extended; and in such case the damages must be fixed with reference to the time when the written contract was broken. *Whittier v. Dana*, 10 Allen (Mass.), 326.

The doctrine of courts of equity, that payment of part of the purchase-money on a parol contract for real estate, and taking possession of the premises under the contract, is such a part performance as takes the case out of the statute of frauds of Indiana, does not prevail in courts of law. *Barickman v. Kuykendall*, 6 Blackf. 21. When the enforcement of a written contract, according to the legal import of its terms, would be fraudulent and wrong, the rule that excludes parol evidence to vary a written contract does not prevail in a court of equity. *Adams v. Smilie*, 50 Vt. 1.

The courts have uniformly inclined to give the words of the statute of frauds full effect, and to refuse to sanction a latitudinous construction thereof. *Delventhal v. Jones*, 53 Mo. 460; *Purner v. Piercy*, 40 Md. 212; 17 Am. Rep. 591.

§ 2. **Remedies in equity.** When a court of equity is called upon to aid a party against the operation of the statute of frauds, and the acts of one who would take an unjust advantage of it, the court scrutinizes the conduct and acts of the party invoking its aid, and demands of him the utmost good faith. *Evans v. Folsom*, 5 Minn. 422. The statute does not prevent showing a mistake in a written instrument, by parol evidence, for the purpose of sustaining a suit in equity to correct the mistake. *McLennan v. Johnston*, 60 Ill. 306.

A parol agreement in respect to lands cannot be avoided in equity on the ground that it is not in writing, where it has been partly performed. *Burdick v. Jackson*, 7 Hun (N. Y.), 488.

A defendant, by demurring to a bill, setting up a parol agreement, and thus admitting the agreement, will nevertheless be entitled to the protection of the statute, if, in his demurrer, he claims such protection, as the demurrer will, in this respect, be treated like an answer. *Van Dyne v. Vreeland*, 3 Stockt. (N. J.) 370. See *Randall v. Howard*, 2 Black (U. S.), 585. Where an agreement has been partly carried into effect, relief is limited to a court of equity. *Davis v. Moore*, 9 Rich. (S. C.) Law, 215.

§ 3. **Pleadings.** The statute of frauds must be taken advantage of by some proper plea. *Lawrence v. Chase*, 54 Me. 196; *Rabsuhl v. Lack*, 35 Mo. 316; *Warren v. Dickson*, 27 Ill. 115. But see *Hotchkiss v. Ladd*, 36 Vt. 593. And when it is pleaded in defense, it is not sufficient to allege that the account stated is barred by the statute of frauds, the facts relied upon in defense under the statute should be set out. *Dinkel v. Gundelfinger*, 35 Mo. 172. In an action on an agreement for the purchase of land, an answer denying the making of the agreement has the same effect as pleading the statute. *Hocker v. Gentry*, 3 Metc. (Ky.) 463. Where the contract appears by the com-

plaint to be by parol, and nothing is alleged to take it out of the statute, the complaint is defective and demurrable, and no answer setting up the statute is needed; the omission to plead is not necessarily a waiver thereof. *Wentworth v. Wentworth*, 2 Minn. 277. In Illinois the statute of frauds with relation to the sale of lands must be specially pleaded. *Lear v. Chouteau*, 23 Ill. 39; *Yourt v. Hopkins*, 24 id. 326.

If a defendant, sought to be charged upon a contract within the statute, admits the contract in his answer, but claims the protection of the statute, his right is the same as though the admission had not been made. *Burt v. Wilson*, 28 Cal. 632; *Ashmore v. Evans*, 3 Stockt. (N. J.) 151.

In pleading the promise of a party to answer for the debt, default or miscarriage of another person, it is not necessary to allege that it was made in writing; it will be presumed to have been reduced to writing unless the contrary appears. *Walsh v. Kattenburgh*, 8 Minn. 127; *Wakefield v. Greenwood*, 29 Cal. 598; *Robbins v. Deverill*, 20 Wis. 142.

If the complainant relies on a part performance, he must allege the facts constituting it in his bill; and these facts are admitted by a demurrer, and it will then be the duty of the court to determine whether they are sufficient to constitute a part performance. *Van Dyne v. Vreeland*, 3 Stockt. (N. J.) 370.

A complaint to have a conveyance set aside as fraudulent, which fails to show either that the plaintiff's claim was for a subsisting indebtedness, or that the conveyance was made with intent to defraud subsequent creditors, will be properly dismissed. *Holmes v. Clark*, 48 Barb. 237.

If the plea avers that the promise sued on was a promise to pay the debt of another, to wit, B, a replication that the promise was not a promise to pay the debt of said B is good. *Hotchkiss v. Ladd*, 36 Vt. 593.

In an action upon a contract required by the statute of frauds to be in writing, it is not necessary to allege in the complaint that it is in writing. For the purposes of the complaint this will be presumed, and unless the contract is denied in the answer, or alleged to be void because not in writing, the statute furnishes no defense. *Marston v. Swett*, 66 N. Y. (21 Sick.) 206.

CHAPTER XXX.

GIVING TIME TO PRINCIPAL.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. In general. The principle that a surety will be discharged if a new agreement be entered into between the creditor and the principal debtor, varying or enlarging the time of the performance of a contract, is borrowed from a court of equity; but it is now well settled, that this defense may be set up at law. *King v. Baldwin*, 17 Johns. 384; *Hubbard v. Gurney*, 64 N. Y. (19 Sick.) 457. And that, without regard to the time of the extension, or whether it has operated to the prejudice of the surety or not. *Haden v. Brown*, 18 Ala. 641. A creditor who has a mortgage security given by the principal debtor, which is worthless by reason of prior liens, will discharge the surety by cancelling the mortgage and taking another. *Atlanta National Bank v. Douglass*, 51 Ga. 205; 21 Am. Rep. 234. See Vol. 5, pp. 239, 240. And the principle applies when a State is a creditor, as well as when an individual is. *Prairie v. Jenkins*, 75 No. Car. 545.

Although a creditor cannot release or compound with the principal debtor without discharging the surety, yet before a surety is thereby discharged, it must be shown that there has been an unauthorized indulgence given or a composition made with such debtor, and that it was effected by an express agreement, founded upon a valid consideration, which was legally binding upon such creditor. *Oberndorf v. Union Bank of Baltimore*, 31 Md. 126; 1 Am. Rep. 31.

§ 2. **Mere delay no discharge of surety.** Mere delay on the part of the creditor, without fraud, or agreement with the principal, does not, however, operate to discharge the surety. *Williams v. Townsend*, 1 Bosw. (N. Y.) 411; *Hunt v. United States*, 1 Gall. (C. C.) 32; *Montgomery v. Dillingham*, 3 Sm. & M. 647; *Allen v. Brown*, 124 Mass. 77. A creditor is not bound to active diligence against the principal, in order to preserve the liability of the surety. If he merely remain passive, the liability of the surety is unimpaired. *Johnson v. Planters' Bank*, 4 Sm. & M. 165; *Lumsden v. Leonard*, 55 Ga. 374;

Summerhill v. Tapp, 52 Ala. 227; *Hooker v. Gooding*, 86 Ill. 60. Even the mere fact that the creditor delayed suing until the principal became insolvent does not necessarily discharge the surety. *Lyle v. Morse*, 24 Ill. 95. But if the creditor is requested by the surety to proceed against the principal, and fails to do so, and the principal afterward becomes insolvent, the surety has been held to be exonerated. *Martin v. Skehan*, 2 Col. T. 614. See Vol. 5, pp. 237, 238.

§ 3. **Effect of creditor's negligence.** A surety is not discharged by the neglect of the creditor to sue the principal, on notice given to him by the surety to do so, unless by such neglect an injury has been sustained by him. *Herbert v. Hobbs*, 3 Stew. (Ala.) 9. The act which will discharge a surety must be legally injurious or inconsistent with his legal rights. Mere indulgence, as we have seen in the preceding section, is not sufficient (See, also, *Moore v. Gray*, 26 Ohio St. 525; *Clopton v. Spratt*, 52 Miss. 251; *Dillon v. Russell*, 5 Neb. 484); nor will an omission of duty, on the part of the creditor, and a consequent injury, discharge the surety unless he has requested the performance of the duty. *Clark v. Sickler*, 64 N. Y. (19 Sick.) 231; S. C., 21 Am. Rep. 606. And a notice by a surety, that he "wishes" the creditor to proceed for his debt, or have it arranged in some way; that he "does not wish" to remain bail any longer, is not a sufficient demand to discharge the surety on the ground that the creditor has failed to sue the principal, after being notified to do so. *Baker v. Kellogg*, 29 Ohio St. 663. So it is held that a verbal offer of a surety to give a bond to the creditor, to save him harmless from all costs, if he will sue the principal, unaccompanied by the tender of such bond, is insufficient to discharge the surety, if such action is not brought. *Eaton v. Waite*, 66 Me. 221. It is likewise held that an offer, upon the part of a principal debtor, to pay, and an omission so to do, because of a request of the creditor that he retain the money, and the subsequent insolvency of the principal, do not discharge a surety. *Clark v. Sickler*, 64 N. Y. (19 Sick.) 231; S. C., 21 Am. Rep. 606. See Vol. 5, pp. 238, 239.

The holder of a promissory note does not discharge the surety by merely omitting to present it to the assignees to whom the principal has assigned his property for the benefit of his creditors. *Dye v. Dye*, 21 Ohio St. 86; 18 Am. Rep. 40.

§ 4. **Valid agreement to extend time discharges surety.** To discharge a surety by an extension of time, there must be a binding agreement for an extension, founded on a sufficient consideration, and without the consent of the surety. *Hogshead v. Williams*, 55 Ind. 145; *Ashton v. Sproule*, 35 Penn. St. 492; *Thornton v. Dabney*, 23

Miss. 559; *Dunham v. Countryman*, 66 Barb. 268; *White v. Whitney*, 51 Ind. 124; *Stewart v. Parker*, 55 Ga. 656. A naked promise, to forbear enforcing the payment of a debt, has no legal efficacy, and works no change in the antecedent relations of the parties. But an agreement for time, sustained by a sufficient consideration, varies the contract, by changing the period for its performance, and not only delays the creditor, but deprives the surety of the right, which he would otherwise have, to compel the principal to fulfill the engagement. Id. See 2 Am. Lead. Cas. (5th ed.) 390. And the agreement need not be in writing, nor in any precise form of words, nor even in express language, but may be inferred from acts, declarations, circumstances, and facts; and, when, from these sources, the mutual agreement of the parties is to be gathered, it is for the jury to determine what were the intention and understanding upon which the minds of the parties met. *Brooks v. Wright*, 13 Allen, 72. Receiving a payment of interest in advance upon a note, after its maturity, by the payee from the maker, implies a contract for the extension of the time of payment during the period for which interest is so paid, and, if such extension be made without the consent of the surety, he will be discharged. *Woodburn v. Carter*, 50 Ind. 376. See, also, *Scott v. Saffold*, 37 Ga. 384; *Robinson v. Miller*, 2 Bush (Ky.), 179; *Dunham v. Downer*, 31 Vt. 249. And this is so, although the agreement be for a usurious rate. *Scott v. Harris*, 76 No. Car. 205; *Brown v. Proffit*, 53 Miss. 649; *Myers v. First National Bank*, 78 Ill. 257. But see *post*, p. 60, § 5. But, an indorsement on a note overdue, of a payment more than enough to pay the interest then due, does not necessarily imply an agreement between the maker and payee for an extension of time, such as will discharge a surety. *Vore v. Woodford*, 29 Ohio St. 245. And it is held that the payment of interest on a note up to the day it is paid, at a greater rate of interest than the party is legally bound to pay, without any other proof, does not show an agreement to extend the time of payment so as to release a surety. *Stearns v. Sweet*, 78 Ill. 446.

The execution of a deed of trust, by a principal, whereby property, not subject to execution, was made liable for its payment, is a good consideration for a promise to extend the time for payment of the note, and such an agreement will discharge the surety. *Semple v. Atkinson*, 64 Mo. 504.

But where the principal has amply indemnified the surety by mortgage, an agreement by the creditor with the principal to extend the time does not discharge the surety. *Kleinhaus v. Generous*, 25 Ohio

St. 667. See, more fully, as to agreements for extension of time, Vol. 5, p. 239 *et seq.*

§ 5. **Invalid agreement does not discharge surety.** It follows from the principles stated in the preceding section, that an invalid agreement for the extension of time does not discharge a surety. To have such effect the contract must be valid. *Hunter v. Clark*, 28 Tex. 159; *Thompson v. Watson*, 10 Yerg. (Tenn.) 362; *Wright v. Watt*, 52 Miss. 634. And see Vol. 5, p. 242. Thus, a usurious contract by a debtor, to pay his creditor for delay, will not discharge the surety, unless the money is paid, because such contract is void. *Id.*; *Burgess v. Dewey*, 33 Vt. 618. Nor will a promise to delay the collection of a debt for an uncertain period discharge a surety. There must be a sufficient consideration, and a time definitely fixed. *Gardner v. Watson*, 13 Ill. 347; *David v. Malone*, 48 Ala. 429. And part payment of the debt does not constitute a valid consideration. *King v. State Bank*, 9 Ark. 185; *Mathewson v. Strafford Bank*, 45 N. H. 104. Nor is a surety discharged because the time of payment was extended by the creditor, unless the latter knew that the surety was such. *Deberry v. Adams*, 9 Yerg. (Tenn.) 52; *Paddleford v. Thacher*, 48 Vt. 574; *Howell v. Lawrenceville, etc., Co.*, 31 Ga. 663; *McGee v. Metcalf*, 12 Sm. & M. 535. But it is not necessary that his name should appear upon the note as surety; it will be sufficient if he was actually a surety, and this was known to the payee when the note was executed. *Flynn v. Mudd*, 27 Ill. 323.

A valid contract between the creditor and one of the sureties to a contract, for an extension of time to the latter, does not discharge another surety from the entire debt (see *Draper v. Weld*, 13 Gray, 580), but only from such part thereof as the first-named surety would be bound to contribute to its payment. *Idle v. Churchill*, 14 Ohio St. 372. See *Yates v. Donaldson*, 5 Md. 389. Where one note is left as collateral security for another, an agreement made without consideration, between the makers of the collateral note and the creditor, to give time, does not exonerate the sureties on the note secured. *New Hampshire, etc., Bank v. Downing*, 16 N. H. 187. So, where the maker of a protested note pays the amount to the original payee and not to the holder, and the holder, with knowledge of the fact, gives further credit to the payee, the maker is not a surety of the payee to be discharged by the indulgence. *Carr v. Lewis*, 20 N. Y. (6 Smith) 138. And see *Watson v. Shuttleworth*, 53 Barb. 357. And where, by the usage of a bank, the credit of a note is continued without a new note being given, and without preventing the bank from collecting the note before such new credit expires, such enlargement of the time of payment will not dis-

charge the surety, as the bank can sue the principal at any time. *Blackstone Bank v. Hill*, 10 Pick. 129.

It is held in a recent case in Virginia that the surety of a public collector or treasurer is not discharged from liability for his principal, on his official bond, by an act of assembly passed subsequent to the execution of the bond, without the surety's assent, extending the time within which, by the law in force at the date of the bond, the officer was required to settle his accounts, and make payment of the public money in his hands. *Smith v. Commonwealth*, 25 Gratt. (Va.) 780.

An extension of the time of payment of a promissory note upon the consideration that the principal will annually pay interest on the note at the rate stipulated therein, will not release the surety. *Christman v. Tuttle*, 59 Ind. 155.

See, as to further illustrations appropriate under this section, Vol. 5, pp. 242, 243.

§ 6. **Effect of discontinuing or staying proceedings against debtor.** The doctrine has been maintained that a creditor may discontinue a suit begun by him against the principal without prejudice to his rights against the sureties, whether he has attached property or not. *Bank of Montpelier v. Dixon*, 4 Vt. 587; *Barney v. Clark*, 46 N. H. 514. But if an execution is issued against a surety and his principal, and is levied, by the direction of the surety, on property of the principal sufficient to satisfy it, and the creditor causes it to be returned without a sale, and the property to be released without the consent of the surety, it is held that the latter is thereby discharged. *Winston v. Yeargin*, 50 Ala. 340. And see *Bank of Missouri v. Matson*, 24 Mo. 333. And the authorities would seem to establish the general rule, that the abandonment of an execution which has once been actually levied on the goods of the principal will discharge the surety (*Curran v. Colbert*, 3 Ga. 239; *City of Maquoketa v. Willey*, 35 Iowa, 323; *State v. Hammond*, 6 Gill & J. [Md.] 157; 2 Am. Lead. Cas. [5th ed.] 395); but this rule does not apply until actual levy, and the surety will not be exonerated by the withdrawal of the writ after it has gone forth, but before the goods have been taken under it by the sheriff. *Id.*; *Royston v. Howie*, 15 Ala. 309; *Miller v. Porter*, 5 Humph. (Tenn.) 294; Vol. 5, p. 245.

§ 7. **Effect of surety's assent.** Time given to the principal at the instance of the surety, or with his consent, does not effect the discharge of the surety (*Treat v. Smith*, 54 Me. 112; Vol. 5, p. 246); and where the creditor gives time to the principal, and the surety afterward, with a knowledge of the fact, agrees to waive all advantage to himself, the inference is, that he agreed to the extension, and no consideration is

necessary to sustain the agreement for waiving the act. *Bank at Decatur v. Johnson*, 9 Ala. 622. And see *Fowler v. Brooks*, 13 N. H. 240; *Porter v. Hodenpuyl*, 9 Mich. 11; Vol. 5, p. 246.

§ 8. **Discharge, how interposed.** See Vol. 5, p. 247. A plea in bar, which alleges the giving of time to the principal, without the knowledge or consent of the surety, upon a good and valuable consideration, without setting out the consideration, is bad (*Marshall v. Aiken*, 25 Vt. 328); so, a plea that, when the obligation fell due, the principal was solvent, and that the creditor neglected and forbore to sue him until he became insolvent, is bad; mere forbearance by the creditor being no discharge of the surety. *Ante*, pp. 57, 58, §§ 2, 3. So, a plea by a surety in a note, that the principal paid to the creditor, after the note became due, a certain sum, and in consideration thereof, the creditor agreed to give the principal further time, is bad upon demurrer, unless it aver that such contract was entered into without the consent of the surety. *Stone v. State Bank*, 8 Ark. 141. And see *ante*, p. 61, § 7.

By the rules of the common law, when the action is upon a *specialty*, the surety cannot set up a parol agreement to enlarge time without his assent, as a defense. It is peculiarly a matter for a court of equity. *Parker v. Watson*, 8 Exch. 404; *Davey v. Prendergrass*, 5 B. & Ald. 187; *Steptoe v. Harvey*, 7 Leigh (Va.), 501; *Tate v. Wymand*, 7 Blackf. (Ind.) 240; *Wittmer v. Ellison*, 72 Ill. 301. And see *Dela-croix v. Bulkley*, 13 Wend. 71. But as it respects bills of exchange and other commercial contracts not under seal, courts of law have long been in the habit of treating them as subject to a very enlarged equity, and affected by defenses which would formerly have driven the parties into a court of equity. *Locke v. United States*, 3 Mas. (C. C.) 446, 453.

And where equitable defenses are now permitted in actions at law (See Vol. 5, p. 672, tit. Equitable Defenses), there would seem to be no valid reason for excluding the same evidence at law that is admissible in equity. It has accordingly been held competent for one of two makers of a promissory note, in an action upon the note, to prove by parol that he signed the note as surety, to enable him to interpose as a defense that he was discharged by an extension of time given to the principal with knowledge of the suretyship. *Hubbard v. Gurney*, 64 N. Y. (19 Sick.) 457; overruling *Campbell v. Tate*, 7 Lans. (N. Y.) 370; *Benjamin v. Arnold*, 5 N. Y. Sup. Ct. (T. & C.) 54. And see *Greenough v. McClelland*, 2 El. & El. 424; 105 Eng. C. L. 428.

It is held in Louisiana that the form of the contract or instrument by which a surety binds himself for the payment of the debt, in case the debtor should not himself satisfy it, does not affect the surety's right to plead, in bar of the action against him, his discharge in consequence of a prolongation of the term of payment, without his consent. *Jones v. Fleming*, 15 La. Ann. 522.

CHAPTER XXXI.

ILLEGALITY.

ARTICLE I.

OF ILLEGALITY IN GENERAL.

Section 1. Definition and nature. No rule of law is more clearly settled than that illegality in a contract will render it void. And when a contract is tainted with illegality, the law will not lend its aid to either party for the enforcement of such contract. Neither courts of law nor of equity will interpose to grant any relief to the parties to an illegal contract, but will leave them where it finds them, if they have been equally cognizant of the illegality, according to the maxim: "*In pari delicto potior est conditio defendentis et possidentis.*" See *Smith v. Bromley*, 2 Dong. 696; *Binnington v. Wallis*, 4 B. & Ald. 650; *Cowan v. Milbourn*, L. R., 2 Exch. 230; *Lowell v. Boston, etc., R. R. Co.*, 23 Pick. 32; *Barker v. Hoff*, 7 Hun (N. Y.), 284. And the true test for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party. *Fivaz v. Nicholls*, 2 C. B. 501; *Taylor v. Chester*, L. R., 4 Q. B. 308; *Holt v. Green*, 73 Penn. St. 198; S. C., 17 Am. Rep. 737. All instruments made for the purpose of giving effect to an illegal agreement are tainted with the illegality and cannot be enforced in a court of equity. *Blasdel v. Fowler*, 120 Mass. 447; 21 Am. Rep. 533.

A contract may be illegal, because it contravenes the principles of the common law, or the special requisitions of a statute. The distinction formerly existing between *mala prohibita* and *mala in se* has been long since abrogated. See *Aubert v. Maze*, 2 Bos. & Pul. 371; *Bank of United States v. Owens*, 2 Pet. 538. And the rule is now well established, that no agreement to do an act forbidden by statute, or to omit to do an act enjoined by statute is binding. *DeBegins v. Armistead*, 10 Bing. 110; *Cope v. Rowlands*, 2 Mees. & W. 153; *D'Allex v. Jones*, 37 Eng. L. & Eq. 476; *Clark v. Protection Ins. Co.*, 1 Story (C. C.), 109; *Kottwitz v. Alexander*, 34 Tex. 689; *Coburn v. Odell*,

30 N. H. 540; *Milton v. Haden*, 32 Ala. 30; *McWilliams v. Phillips*, 51 Miss. 196; *Hooker v. DePalos*, 28 Ohio St. 251; *Durgin v. Dyer*, 68 Me. 143. Whenever a contract has been entered into for the performance of an immoral act, or an act which is contrary to the provisions of an act of the legislature, or to the public policy of the common law, the courts will not lend their assistance for the enforcement of the contract, whether it be a simple contract, or even a contract under seal. *Merrick v. Trustees*, 8 Gill (Md.), 59; *Scudder v. Andrews*, 2 McLean (C. C.), 464; *Spalding v. Preston*, 21 Vt. 9. And the general rule is, that contracts, void by the law of the land where made, are void everywhere else, and that whatever is a good defense in the place of contract, is a valid one wherever the contract is attempted to be enforced. *Kennedy v. Cochrane*, 65 Me. 594. Nor is it necessary that the illegality shall be apparent upon the face of the contract; for, ordinarily, when parties enter into an illegal contract, it is done in such manner as, in form, to conceal the illegality. See *Riley v. Jordan*, 122 Mass. 231. It is therefore held that, if the illegality does not appear on the face of the contract, it may still be shown, through the medium of parol or oral testimony, whether the contract be under seal, or a mere simple unsealed written agreement. *Brown v. Brown*, 34 Barb. 533. But the courts will not presume a contract to be illegal; on the other hand, every thing must be presumed to have been legally done till the contrary be proved. *Bennett v. Clough*, 1 B. & Ald. 463; *Tucker v. Streetman*, 38 Tex. 71; *Craft v. Bent*, 8 Kans. 328. It is the benefit of the public, and not the advantage of the defendant to an action, that is to be considered in cases in which one or more of several parties *in pari delicto* rely for defense upon the illegality of the transaction out of which the claim arises. In such cases, *the presumption is in favor of the transaction*, and if it be susceptible of two meanings, one legal and the other not, that interpretation will be put upon it which will support and give it operation. *Lewis v. Davison*, 4 Mees. & W. 654; *Mittelholzer v. Fullarton*, 6 Q. B. 989; *Bibb v. Miller*, 11 Bush (Ky.), 306. So, the rule that a contract founded on an act prohibited by statute is void, is subject to the qualification that, although the legislature may forbid the doing of a particular act, yet, unless the act itself is declared void, a party not privy to it, or involved in the guilt of the transaction, may recover of the guilty actor (*Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538); nor is such rule applicable where the contract is prohibited for the mere protection of one of the parties against an undue advantage which the other party is supposed to possess. *Scotten v. State*, 51 Ind. 152. And see *Watrous v. Blair*, 32

Iowa, 58. And the rule that courts will not aid one whose cause of action is founded on an illegal contract, should not be extended so as to encourage violations of contracts for payment of honest debts, as between the parties, because growing out of tainted originals. *Bly v. Second National Bank*, 79 Penn. St. 453. And where a mortgagee obtains possession of mortgaged personal property on account of a breach of the terms and conditions of the mortgage, the mortgagor cannot maintain replevin for the property on the ground that the consideration of the mortgage is illegal. *Dougherty v. Bonavid*. 124 Mass. 210.

The validity of a contract must be determined by the statute in force at the time it is made. If it is valid when made, a subsequent change or repeal of the law cannot impair its validity; and if it is void when made, no subsequent law can impart to it validity. *Mays v. Williams*, 27 Ala. 267; *Bennett v. Woolfolk*, 15 Ga. 213. And where the contract, being in violation of the statute, is void, the subsequent repeal of the statute will not render it valid. *Milne v. Huber*, 3 McLean (C. C.), 212; *Bancho v. Mansel*, 47 Me. 58; *Gilliland v. Phillips*, 1 So. Car. 152.

Where an illegal contract or transaction is only partially performed, there is a *locus penitentie*, and either party may rescind the contract. *Knowlton v. Congress & Empire Spring Co.*, 14 Blatchf. 364. But see S. C., 57 N. Y. (12 Sick.) 518, which holds to the contrary.

§ 2. As a defense to sealed instruments. It is a well-established principle, that illegality may be pleaded as a defense to an action on a sealed instrument, either where the illegality exists at common law, or where it is occasioned by the enactments of some statute. *Collins v. Blantern*, 2 Wils. 341; S. C., 1 Sm. Lead. Cas. 489; *Hilton v. Eckersley*, 6 El. & Bl. 47, 66; *Egerton v. Lord Brownlow*, 4 H. L. Cas. 1; *Bowen v. Buck*, 28 Vt. 308; *Shaw v. Reed*, 30 Me. 105; *Graeme v. Wroughton*, 11 Exch. 146; *Goldham v. Edwards*, 18 C. B. 389. And it was said to have been generally understood since the case of *Pole v. Harrobin*, 9 East, 416, *n.*, that an obligor is not restrained from pleading any matter which shows that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond. *Paxton v. Popham*, 9 East, 408, 421. See Vol. 1, p. 699, where the cases are carefully collected.

A bond executed for the purpose of influencing an officer in the discharge of his duty so as to benefit the party giving the obligation, is based upon an illegal consideration and cannot be enforced. *Cook v. Shipman*, 51 Ill. 316; 24 *id.* 614.

In respect to agreements void in part, it was unanimously agreed, in

a very early case, that if some of the covenants of an indenture, or of the conditions indorsed upon a bond, are against law, and some good and lawful, that in such case, at the common law, the covenants or conditions which are against law are void *ab initio*, and the others stand good. *Norton v. Simmes*, Hob. 12 c.; S. C., Moore, 856. See, also, *Chesman v. Nainby*, 2 Ld. Raym. 1456. And the principle has been applied in many modern English cases. See *Gaskell v. King*, 11 East, 165; *Sheerman v. Thompson*, 14 Ad. & El. 1027; *Nicholls v. Stretton*, 10 Ad. & El. (N. S.) 346; *Mullan v. May*, 11 Mees. & W. 653; *Price v. Green*, 16 id. 346. The same rule is recognized and applied by the American courts. Thus, it is held that, while the illegality of any portion of an entire consideration will vitiate the contract (*Chandler v. Johnson*, 39 Ga. 85; *Clements v. Marston*, 52 N. H. 31), yet where a contract is for the doing of two or more things, which are entirely distinct, and one of them is prohibited by law and the others are legal, such illegality of the one stipulation cannot be set up as a bar to an action for a breach of one of the valid stipulations. *Id.*; *Erie Railway Co. v. Union Locomotive, etc., Co.*, 35 N. J. Law, 240. The rule, as sometimes expressed, is, if a contract, part of which is repugnant to law and against public policy, while the other part is not, can be divided, so much as is unexceptionable may be enforced. *Fackler v. Ford*, McCahon (Kans.), 21; *Hanauer v. Gray*, 25 Ark. 350. But where covenants, which are against law, enter into and form a part of the entire consideration of a contract, a separation of the good consideration from that which is illegal will be attempted only in those cases in which the party seeking to enforce the contract is not the wrong-doer. Where both parties are in equal fault, no remedy can be had in a court of justice on an illegal transaction. *Saratoga County Bank v. King*, 44 N. Y. (5 Hand) 87.

A bond may be void for disobedience to a statute, although the statute contains no words of positive prohibition. The recognized doctrine is, that every contract made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute. *Bartlett v. Vinor*, Carth. 252; *Fergusson v. Norman*, 5 Bing. N. C. 80; *Swords v. Owen*, 43 How. (N. Y.) 176; S. C., 2 Jones & Sp. 277; *The Pioneer*, Deady, 72; *Watrous v. Blair*, 32 Iowa, 58. Courts will not, even with the consent of the parties, enforce a contract which is in violation of a statute, although not therein declared void. *Fowler v. Scully*, 72 Penn. St. 456; S. C., 13 Am. Rep. 699. But while, as

a general rule, a penalty prescribed by statute for the doing of an act implies a prohibition which will render the act void, yet this is not always so, and in every instance courts will look to the language and subject-matter of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished by the enactment; and if, from all these, it is manifest that it was not intended to render the prohibited act void, the courts will so hold and construe the statute accordingly. *Pangborn v. Westlake*, 36 Iowa, 546; *Fergusson v. Norman*, 5 Bing. N. C. 76; *Fuckler v. Ford*, 24 How. (U. S.) 322; *Oneida Bank v. Ontario Bank*, 21 N. Y. (7 Smith) 490, 495.

Corporations, which are creatures of law, are, when their seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred. But where a corporation is created by an act of the legislature for particular purposes, with special powers, their deed, though under their corporate seal, and that regularly affixed, does not bind them if it appear by the express provisions of the statute creating the corporation, or by reasonable inferences from its enactments, that the deed was *ultra vires*; that is, that the legislature meant that such a deed should not be made. *South Yorkshire, etc., Railway Co. v. Great Northern Railway Co.*, 9 Exch. 55, 84. See, also, *Mayor of Norwich v. Norfolk Railway Co.*, 4 El. & Bl. 413. See Vol. 2, pp. 332, 335. But the invalidity of contracts made in violation of statutes is subject to the equitable exception, that although a corporation in making a contract acts in disagreement with its charter when it is a simple question of *capacity* or *authority* to contract, a party who has the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. The defendant cannot be permitted to repudiate a contract, the fruits of which he retains. Sedgw. Stat. & Const. Law, 90; *Pratt v. Short*, 53 How. (N. Y.) 506; *Township of Pine Grove v. Talcott*, 19 Wall. 666, 678.

§ 3. **As a defense to unsealed instruments.** In respect to the defense of illegality, the same general principles are applicable, whether the illegal contract be in writing not under seal, or the instrument of writing be sealed. In neither case will the courts lend their assistance for the enforcement of the contract. See *ante*, p. 65, § 1.

§ 4. **As a defense to oral agreements.** Illegality is likewise available as a defense to actions on oral agreements, and the same general rules apply as in the case of written agreements. See *ante*, pp. 65, 66, §§ 1, 2.

§ 5. **Who may interpose the defense.** The maxim, "*Ex turpi causa, non oritur actio*," is an old and familiar one, resting on the clearest principles of public policy, and never to be ignored. In accordance with this maxim, nothing is better settled than that, in regard to contracts which are entered into for fraudulent or illegal purposes, the law will aid neither party to enforce them while they remain *executory*, either in whole or in part, nor, when *executed*, will it aid either party to place himself in *statu quo* by a rescission, but will, in both cases, leave the parties where it finds them. *Nellis v. Clark*, 20 Wend. 24; *Goudy v. Gebhart*, 1 Ohio St. 266; *Knowlton v. Congress, etc., Spring Co.*, 57 N. Y. (12 Sick.) 528; *Hoover v. Pierce*, 26 Miss. 627; *McWilliams v. Phillips*, 51 id. 196; *Hooker v. DePalos*, 28 Ohio St. 251; *ante*, p. 65, § 1. If the parties be *in pari delicto*, they will be left remediless (*id.*); their contract will not be set aside, and any money which may have been advanced cannot be recovered back. *Howson v. Hancock*, 8 Term R. 575; *McLoskey v. Gordon*, 26 Miss. 260; *Boughton v. Boughton*, 4 Rich. (So. Car.) 491; *Thomas v. Richmond*, 12 Wall. 349; *Setter v. Alvey*, 15 Kans. 157. And if goods be sold and delivered for an illegal purpose, the illegality may be set up as a complete defense to an action for the price. *Heineman v. Newman*, 55 Ga. 262; S. C., 21 Am. Rep. 279. See *contra*: *Hubbard v. Moore*, 24 La. Ann. 591; S. C., 13 Am. Rep. 128; *Mahood v. Teabza*, 26 La. Ann. 108; S. C., 21 Am. Rep. 546.

§ 6. **Who cannot interpose it.** If the parties be not *in pari delicto*, the rule is directly the reverse of that stated in the preceding section. See *Quirk v. Thomas*, 6 Mich. 76. And whenever one party, acting under circumstances of great need or oppression, makes a contract in violation of a law, or rule of public policy, intended to protect persons against oppression, he is not in equal fault, and he may recover of the other any money that he may have advanced, or he may have his contract set aside (*Smith v. Browley*, 2 Doug. 696; *Lowell v. Boston, etc., R. R. Co.*, 23 Pick. 32; *Scotten v. State*, 51 Ind. 52); relief being granted in such cases, on the ground that the public interest, and not solely the private interest of the individual requires it. 1 Story's Eq. Jur. 298; *Bibb v. Miller*, 11 Bush (Ky.), 306. So, if the contract be *executory*, to do an act not immoral in itself, but prohibited by some special rule of public policy, and one party advanced money in consideration of the future execution of the illegal act, the intermediate time between such advance and the performance of the act is a *locus penitentiæ*, during which he may rescind his contract and utterly abandon it, and recover the money advanced (*Tappenden v. Randall*, 2 Bos. & Pul. 467; *White v. Franklin Bank*, 22 Pick. 189;

Adams Express Co. v. Reno, 48 Mo. 264; *Hooker v. DePalos*, 28 Ohio St. 251; 1 Story on Cont., § 617; and this is the rule although the parties be equally in fault. *Id.* But see *Saratoga County Bank v. King*, 44 N. Y. (5 Hand) 87; *Smith v. Hubbs*, 10 Me. 76.

Where an illegal contract is entered into between a corporation and one of its trustees, who, as such trustee, was moving and active in inducing the action of the corporation, the latter cannot claim that he was not in *pari delicto* with the former. He is, of the two, the more culpable, and the degree of culpability is not affected by the fact that the contract on the part of the corporation was *ultra vires*. *Knowlton v. Congress, etc., Spring Co.*, 57 N. Y. (12 Sick.) 518.

§ 7. **How interposed.** Illegality must be specially pleaded, whether the defense be made under the common law or by statute. *Barnett v. Glossop*, 3 Dowl. 625; S. C., 1 Bing. N. C. 633; *Dickson v. Burk*, 6 Ark. 412; *Stannard v. McCarty*, 1 Morr. (Iowa) 124; *Huston v. Williams*, 3 Blackf. (Ind.) 170; *Suit v. Woodhall*, 116 Mass. 547; *Cummins v. Barkalow*, 4 Keyes (N. Y.), 514; S. C., 1 Abb. Ct. App. 479; *United States v. Sawyer*, 1 Gall. (C. C.) 87; *Chambers v. Games*, 2 Iowa, 320.

ARTICLE II.

IMMORAL CONTRACTS.

Section 1. In general. All contracts entered into in violation of morality, and founded upon considerations *contra bonos mores*, are void. The rule as now settled is, that where a contract grows *immediately* out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it; and if the contract is connected in part only with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it. *Toler v. Armstrong*, 4 Wash. 297; S. C. affirmed, 11 Wheat. 258; 2 Kent's Com. 466. And see *Kottwitz v. Alexander*, 34 Tex. 689; *Brua's Appeal*, 55 Penn. St. 594; *Smith v. Barstow*, 2 Dougl. (Mich.) 155; *Dumont v. Dufore*, 27 Ind. 263; *Merrick v. Trustees, etc.*, 8 Gill (Md.), 59. But it is held that however discreditable an act may be in a moral point of view, or as a breach of confidence, it does not follow that the act is on that account a corrupt one within the meaning of the law so as to avoid a contract. It must be corrupt as tainted by fraud, or illegal as in violation of some rule of law or some statute, to warrant such a defense. *Moore v. Remington*, 34 Barb. 427.

§ 2. **When contract void for immorality.** Applying the principle above stated it is held, that all contracts, whether they be parol, or

under seal, made in consideration of *future* illicit sexual intercourse, are utterly void. *Coolidge v. Blake*, 15 Mass. 427; *Singleton v. Bremer*, Harp. (S.C.) 201; *Winebrinner v. Weisiger*, 3 T. B. Monr. (Ky.) 35; *Walker v. Gregory*, 36 Ala. 180; *Walraven v. Jones*, 1 Houst. (Del.) 355; *Baldy v. Stratton*, 11 Penn. St. 316. Nor will the consideration of a *past* seduction and cohabitation support a *parol* promise. *Beaumont v. Reeve*, 8 Q. B. 483; *Fisher v. Bridges*, 3 El. & Bl. 642; *Jennings v. Brown*, 9 Mees. & W. 496. A promise by the putative father to pay for the board of a woman and her bastard child, the purpose of both parties, express or tacit, being to facilitate a continued state of cohabitation between the promisor and woman, is void. *Trovinger v. M' Burney*, 5 Cow. 253. If a lodging is knowingly let for the purposes of prostitution, an action will not lie for the use of it. *Girardy v. Richardson*, 1 Esp. 13; *Appleton v. Campbell*, 2 Carr. & P. 347; *Dyett v. Pendleton*, 8 Cow. 727. Nor will an action lie upon a contract for clothes, or board and lodging, the price of which is to be paid out of the profits of prostitution. *Bowry v. Bennet*, 1 Camp. 348; *Mackbee v. Griffith*, 2 Cranch (C. C.), 336. And in the absence of evidence that the plaintiff looked expressly to the proceeds of the defendant's prostitution for payment, but the jury found that he knew her to be a prostitute, and supplied the article with a knowledge that it would be, as in fact it was, used by her as part of her display to attract men, it was held that the plaintiff could not recover. *Pearce v. Brooks*, L. R., 1 Exch. 213; S. C., 4 Hurl. & C. 358. But see § 3, below. A contract for the printing or sale of obscene or libelous books and prints is void. *Fores v. Johnes*, 4 Esp. 97; *Stockdale v. Onwhyn*, 2 Carr. & P. 163. And it is a good defense to an action for not supplying manuscript according to agreement that the matter of the work is libelous and immoral. *Gale v. Leckie*, 2 Stark. 107.

Contracts for the purchase and sale of slaves are against sound morals and natural right, and have no validity unless sanctioned by positive law, and can only be enforced so long as that law remains in force; and if repealed, no action lies to enforce a contract made prior thereto. *Osborn v. Nicholson*, 1 Dill. (C. C.) 219; *Buckner v. Street*, id. 248. See, also, *Lytle v. Whicher*, 21 La. Ann. 182; *Atkins v. Busby*, 25 Ark. 176.

§ 3. **When not void for immorality.** Where a ward had a child by her guardian and she agreed to settle property on it, it was held that the agreement was not *per se* void. *Flanagan v. Garrison*, 28 Ga. 136. So where the reputed father of an illegitimate child promised to pay the mother an annuity if she would maintain the child, and keep secret their connection, it was held that the maintenance of the child

was a sufficient consideration to sustain assumpsit. *Jennings v. Brown*, 9 Mees. & W. 496; *Smith v. Roche*, 6 C. B. (N. S.) 223. And see, also, *Haven v. Hobbs*, 1 Vt. 238; *Holcomb v. Stimpson*, 8 id. 141; *Robinson v. Crenshaw*, 2 Stew. & P. (Ala.) 276. And although the consideration of a past seduction will not support a *parol* promise (see § 2, *ante*, p. 71,) yet, a *sealed* contract, made in consideration of past seduction and cohabitation, or past cohabitation, without seduction, can be enforced; for the reason that a specialty imports a consideration, which, if not unlawful, both parties thereto are estopped from denying. *Matthew v. Hanbury*, 2 Vern. 187; *Annandale v. Harris*, 2 P. Wms. 432; *Turner v. Vaughan*, 2 Wils. 339; *Self v. Clark*, 2 Jones' (No. Car.) Eq. 309; *Wyant v. Lesher*, 23 Penn. St. 338; 1 Story on Cont., § 670. See *Cusack v. White*, 2 Mill's (So. Car.) Const. 279.

The mere fact that a person to whom board and lodging is furnished, or to whom articles are sold, is a prostitute, does not invalidate the contract therefor, unless the very object of the agreement be to pander to her prostitution. Thus, if articles of clothing are sold to a prostitute, an action will lie to recover their value, although the seller knew of the lewd life of the purchaser. *Bowry v. Bennet*, 1 Camp. 348. So, where the plaintiff was employed to wash clothing for the defendant, who was a prostitute, knowing her to be such, it was held that the use to which the clothing might be applied, could not bar the plaintiff of an action for work and labor. *Lloyd v. Johnson*, 1 Bos. & Pul. 340. And see *McKinney v. Andrews*, 41 Tex. 363. And it has been held that a dealer in furniture has the right to trade with, and make sales of, furniture to a person engaged in keeping a house of prostitution, and the courts will enforce such right by compelling the person who purchases the furniture to pay for it, although it be shown that the vendor knew at the time of the sale the use to which the furniture was to be applied. *Hubbard v. Moore*, 24 La. Ann. 541; S. C., 13 Am. Rep. 128; *Sampson v. Townsend*, 25 La. Ann. 78; *Mahood v. Tealza*, 26 id. 108; S. C., 21 Am. Rep. 546. But see *Pearce v. Brooks*, L. R., 1 Exch. 213; S. C., 4 Hurl. & C. 358. In an action for work done and materials furnished in fitting up a house, it is no defense that the work was done and the materials furnished with the knowledge, on the part of the plaintiff, that the defendant intended to use it for gambling purposes. *Michael v. Bacon*, 49 Mo. 474; 8 Am. Rep. 138, 140, note.

The mere knowledge on the part of the lender of money that the borrower intends making an illegal use of the money, is not sufficient to fix the stain of illegality upon the transaction. In order to have such effect, it must appear that the lender made the loan, on his part,

to procure the doing of the illegal act. *McGavock v. Puryear*, 6 Coldw. (Tenn.) 34. If the loan is so tainted, no subsequent renewal can remove the taint, and it will make no difference into whose hands a note given for the loan may pass after its maturity. *Id.*

§ 4. **Executed immoral contracts.** In cases of immoral or illegal contracts which have been executed, the courts will not interfere to set them aside, but will leave the parties as they find them if they have been equally in fault. *Howell v. Fountain*, 3 Ga. 176; *Worcester v. Eaton*, 11 Mass. 368; *Marksbury v. Taylor*, 10 Bush (Ky.), 519; *White v. Hunter*, 23 N. H. 128; *Gisaf v. Neval*, 81 Penn. St. 354; *Kerr v. Birnie*, 25 Ark. 225. If, therefore, one person advances money to aid another in violating the law, he cannot recover it back. *Hall v. Costello*, 48 N. H. 176; S. C., 2 Am. Rep. 207; *McGavock v. Puryear*, 6 Coldw. (Tenn.) 34. And so, if one party pays another a sum of money to prevent exposure of a violation of law by the party paying. *Arter v. Byington*, 44 Ill. 468. And where an illegal contract has been fully executed, and money paid thereunder remains in the hands of a mere depository, who holds the money for the use of one of the parties to the contract, an action brought to recover the money so held will be sustained. *Woodworth v. Bennett*, 43 N. Y. (4 Hand) 273; S. C., 3 Am. Rep. 706; reversing S. C., 53 Barb. 361. See *ante*, p. 69, Art. 1, § 6.

§ 5. **Who may set up immorality.** See general rules as to, *ante*, pp. 68, 69, Art. 1, §§ 5, 6.

§ 6. **How interposed or waived.** See *ante*, p. 70, Art. 1, § 7.

ARTICLE III.

OF CHAMPERTY.

Section 1. Definition and nature. Champerty is defined to be "a bargain with a plaintiff or defendant in a suit, for a portion of the land or other matter sued for, in case of a successful termination of the suit which the champertor undertakes to carry on at his own expense." 1 Bouv. Dict. 254, 255; *Meeks v. Dewberry*, 57 Ga. 263. And see *In re Masters*, 4 Dowl. P. C. 18; *Barnes v. Strong*, 1 Jones' (No. Car.) Eq. 100; *Holloway v. Lowe*, 7 Port. (Ala.) 488. Champerty is distinguished from maintenance chiefly in this, that in the former, the compensation to be given for the service rendered is a part of the matter in suit, or some profit growing out of it. *Id.*; *Arden v. Patterson*, 5 Johns. Ch. 44. While the latter does not involve any agreement for an interest in the subject-matter. *Id.*; *Wheeler v. Pounds*

24 Ala. 472; *Lathrop v. Amherst Bank*, 9 Mete. 489; *Quigley v. Thompson*, 53 Ind. 317. Maintenance has been said to be now confined to cases where a stranger having no interest in the suit, improperly, and for the purpose of stirring up litigation and strife, encourages others to bring actions or to make defenses which they have no right to make. *Findon v. Parker*, 11 Mees. & W. 675. And see *Flight v. Leman*, 4 Q. B. 883; *Thallhimer v. Brinckerhoff*, 3 Cow. 623, 647. Maintenance is the generic offense of which champerty is a species. *Sedgwick v. Stanton*, 14 N. Y. (4 Kern.) 289. It is against the policy of the law to permit the traffic in lawsuits, thus encouraging the bringing of actions, when otherwise no suit might ever arise; and so odious, in the eyes of the law, are such contracts, that they confer no rights on the parties making them (*Thompson v. Warren*, 8 B. Monr. [Ky.] 488; *Thurston v. Percival*, 1 Pick. 415), and if one pays out money under them, he cannot recover it back. *Burt v. Place*, 6 Cow. 431.

§ 2. **When it renders a contract void.** The general doctrine is well established that contracts founded on any species of unlawful maintenance or champerty are void. *Brown v. Beauchamp*, 5 T. B. Monr. (Ky.) 413; *Thurston v. Percival*, 1 Pick. 415. Nor does the rule in equity differ from that which obtains at law; in both tribunals champerty constitutes a complete defense to a contract. 2 Story's Eq. Jur., § 1049; *Arden v. Patterson*, 5 Johns. Ch. 44, 48; *Mann v. Fairchild*, 2 Keyes (N. Y.), 106; S. C., 3 Abb. Ct. App. 152; *Martin v. Clarke*, 8 R. I. 389; 5 Am. Rep. 586. It avoids every contract into which it enters. *Id.*

An agreement to aid in defending a suit with one who is not licensed as attorney or counsel is illegal and void for maintenance. *Burt v. Place*, 6 Cow. 431. And a contract between an attorney and counselor at law and a client, that the attorney shall prosecute a claim at his own cost and charge, for a certain part of the subject in litigation, is clearly champertous, illegal and void. *Halloway v. Lowe*, 7 Port. (Ala.) 488; *Weakly v. Hall*, 13 Ohio, 167; *Martin v. Clarke*, 8 R. I. 389; S. C., 5 Am. Rep. 586; *Low v. Hutchinson*, 37 Me. 196; *Brotherson v. Consalus*, 26 How. (N. Y.) 213; S. C. affirmed, 6 Alb. L. J. 196; *Scobey v. Ross*, 13 Ind. 117. A contract to collect a note for another, and to receive, as compensation therefor, one-half the amount collected, is champertous; and if collected, and the money is received by the owner of the note, the party performing the service is not entitled to recover a moiety or any other sum of such owner. *Byrd v. Odem*, 9 Ala. 755. A contract to prosecute a claim against the government, for another person, and pay all expenses and to

receive as compensation therefor a certain portion of the amount recovered, if successful, and nothing if not successful, is champertous and wholly void. *Coquillard v. Bearss*, 21 Ind. 479. An agreement to be carried into effect in England, which would be void on the ground of champerty if made there, is not the less void because made in a foreign country where such a contract would be legal. *Grell v. Levy*, 16 C. B. (N. S.) 73. See *Thurston v. Percival*, 1 Pick. 415. So, it is held in England, that a contract whereby an attorney stipulates with a client to receive, in consideration of the large advances requisite to bring the proceedings to a successful issue, over and above his legal costs and charges, a sum which should be commensurate with his outlay and exertions, and with the benefit resulting to the client, is as much void for maintenance as if the attorney were to have a share of the property recovered. *Earle v. Hopwood*, 9 C. B. (N. S.) 566. And a contract by a client to pay a *barrister* in England for advocating his cause, whether made before or during or after the litigation, is illegal and cannot be enforced. *Kennedy v. Brown*, 13 id. 677.

An agreement by an attorney to pay any judgment which should be finally rendered against his client in a specified suit, if the latter would appeal the case and pay the attorney a fee for conducting the appeal, is void, and cannot be enforced by either attorney or client. *Adye v. Hanna*, 47 Iowa, 294.

A contract entered into between a father and his son during the pendency of a suit against the former, by which the latter agrees to defend the suit for the former in consideration of recovering a portion of the property in controversy in case of success, is held to be void, as being within the prohibition of the common law against maintenance and champerty. *Barnes v. Strong*, 1 Jones' (No. Car.) Eq. 100. So, a bond conditioned that the obligee should "break the will" of a deceased person, of whom the obligors were next of kin, or "if they failed to break the will, should pay all the costs of the suit that shall be brought," is void on the ground of maintenance, and as being against public justice. *Martin v. Amos*, 13 Ired. (No. Car.) L. 201.

The rescission of a champertous contract after the action was commenced does not prevent the legal bar to that action. *Harman v. Brewster*, 7 Bush (Ky.), 355.

An agreement, of which the consideration is the sale of lands held adversely by a third person, is deemed champertous and void. It has been often decided, that if a person sell land, held at the time adversely by another, the sale is not a valid consideration for the promise to pay the purchase-money, the contract being a species of champerty, and void on general principles of law and public policy (*Whitaker v.*

Cone, 2 Johns. Cas. 58; *Monnot v. Husson*, 39 How. [N. Y.] 447; *Brinley v. Whiting*, 5 Pick. 355; *Gibson v. Shearer*, 1 Murph. (No. Car.) 114; *Martin v. Pace*, 6 Blackf. [Ind.] 99; *Loud v. Darling*, 7 Allen, 206; *Ring v. Gray*, 6 B. Monr. [Ky.] 368; and it is held to be immaterial, in such a sale, whether the title of the vendor be good or bad, if the land be held adversely to him. *Tomb v. Sherwood*, 13 Johns. 289. But where only part of the land conveyed is held adversely, the conveyance is not void. The adverse possession to have this effect must be an actual, continued, visible, notorious, distinct and hostile possession of the whole tract of land included in the conveyance. *Cassedy v. Jackson*, 45 Miss. 397, 404. With regard to the vendor's knowledge of the condition of his property, it has been repeatedly held, that a person who sells and conveys land without the knowledge that there is a subsisting, adverse possession, is not liable to the penalty of the statute for selling a pretended title, even although he should know that there was an adverse claim (*LeRoy v. Veeder*, 1 Johns. Cas. 417; *Etheridge v. Cromwell*, 8 Wend. 629; *Sessions v. Reynolds*, 7 Sm. & M. [Miss.] 161); but the seller of land is, in the first instance, to be presumed to be cognizant of the situation of it. *Id.* Where an executory contract is made for the sale of land, while the vendor is in peaceable possession, a deed in pursuance thereof afterward given, when the land is in adverse possession, is not void for champerty. *Chiles v. Conley*, 9 Dana (Ky.), 385. But the purchase of land, during the pendency of a suit concerning it, if made with a knowledge of the suit, and not in consummation of a previous bargain, is champertous and void. *Jackson v. Ketchum*, 8 Johns. 482; 4 Kent's Com. 449. This rule has, however, no application to sales or assignments of personal property or choses in action; and any debt or claim may be assigned after the institution of a suit for the recovery thereof, unless the assignment savor of maintenance: as if it be made on condition that the suit shall be prosecuted, or if the assignee undertake to pay costs, or make advances beyond the mere support of the exclusive interest he has so acquired. *Harrington v. Long*, 2 Myl. & K. 590; *Thalhimer v. Brinckerhoff*, 3 Cow. 623, 647; 1 Story on Cont., § 714; and see Vol. 1, p. 356.

§ 3. **Where it does not.** When the owner of a chattel has settled with his bailee, for an injury to the chattel while in the bailee's hands, an agreement that the bailee may bring a suit in the owner's name, but at his own risk and expense, and for his own benefit, is not void for champerty. *Rindge v. Coleraine*, 11 Gray, 157. So, where A obtained permission to bring a suit in the name of B, to recover a debt supposed to be due from C, and promised B to indemnify him against

all costs and damages that B might thereby sustain, the promise was held to be valid, and the contract not to be void for champerty. *Knight v. Savin*, 6 Me. 361. And a contract entered into between an attorney and his client, in which the latter agrees to pay a stipulated sum for the services of the former, dependent upon the contingency of the success of the attorney, is held to be valid, and in case of the attorney's success, the amount stipulated may be recovered at law. *Spencer v. King*, 5 Ohio, 183. And see *Moore v. Campbell Academy*, 9 Yerg. (Tenn.) 115; *Ryan v. Martin*, 16 Wis. 57. The conveyance of land, pending a suit to set aside a deed therefor, if made to one not having any connection with the action or knowledge of it, is not void for champerty. *Rowe v. Beckett*, 30 Ind. 154. And the mere possibility that the purchaser of a title may be obliged to bring a suit to perfect his right, does not render the purchase illegal upon the reasons which apply to a purchase of property in litigation. *Kellar v. Blanchard*, 21 La. Ann. 38. See *ante*, § 2, pp. 74, 75.

The common-law doctrine as to maintenance has no application to persons who either have any real interest in the suit promoted by them, or who act in the *bona fide* belief that they have. Any interest whatever in the subject of the suit is sufficient to exempt him who gives aid to the suitor, from the charge of illegal maintenance. Whether this interest is great or small, vested or contingent, certain or uncertain, it affords a just reason to him who has such an interest, to participate in the suit of another, who also has or claims some right to the same subject. *Thalhimer v. Brinckerhoff*, 3 Cow. 623, 647; *Wickham v. Conklin*, 8 Johns. 220; *Findon v. Parker*, 11 Mees. & W. 675, 682. So, it sometimes may be useful and convenient, where one has a just demand, which he is not able from poverty to enforce, that a more fortunate friend should assist him, and await for his compensation until the suit is determined, and be paid out of the fruits of it. *Thurston v. Percival*, 1 Pick. 417. It is accordingly held to be the law, that any one may lawfully give money to a poor man, to carry on his suit (*Id.*; *Perine v. Dunn*, 3 Johns. Ch. 508); and whoever is, in any way, of kin or affinity to either of the parties, may assist, or apply to counsel to assist him. *Id.* See, also, *Baker v. Whiting*, 3 Sumn. (C. C.) 475; *Master v. Miller*, 4 Term R. 320, 340; *Gilleland v. Failiny*, 5 Denio, 308. And where several persons have an interest in the same subject-matter, and they agree that one of them shall bring a suit in his own name, for the joint benefit of all, and also agree as to the manner of distributing the avails of the suit toward payment, or in discharge of their several claims, the objection of maintenance does

not apply to such agreement. *Frost v. Paine*, 12 Me. 111. See, also, *Gowen v. Nowell*, 1 id. 292.

The reasons which make a law against maintenance and champerty, salutary or necessary, in England, do not exist to the same extent in this country (See *Roberts v. Cooper*, 20 How. [U. S.] 467); and in some of the States the law of maintenance and champerty is not recognized as a part of the common law. Thus, it is not in force in New York except by statute (*Sedgwick v. Stanton*, 14 N. Y. [4 Kern.] 289; *Zogbaum v. Parker*, 66 Barb. 341; S. C. affirmed, 55 N. Y. [10 Sick.] 120); nor, it seems, is it recognized as a part of the common law of Connecticut. *Richardson v. Rowland*, 40 Conn. 565. See, also, *Danforth v. Streeter*, 28 Vt. 490; *Wright v. Meek*, 3 Iowa, 472. In Texas there is no law in force prohibiting champerty, and if a lawyer helps his client to recover lands from the possession of another, and takes a part of the land for his fee, if the right of his client is clear to the land, the transaction is held to be lawful. *Bentinick v. Franklin*, 38 Tex. 458. So, in some of the other States it is held that a purchase by an attorney, of the whole, or of a part of the subject-matter of litigation, or a contract for payment out of what shall be recovered therein, is valid and will be enforced, unless, perhaps, where the bargain is harsh and unreasonable. *Bayard v. McLane*, 3 Harr. (Del.) 216; *Lytle v. State*, 17 Ark. 693; *Newkirk v. Cone*, 18 Ill. 449; *Fetrow v. Merriwether*, 53 id. 275. And see Vol. 1, pp. 452, 453. In Kentucky a distinction is made between a contest for a *direct* interest in the subject-matter of a suit, and one for a sum which shall be a certain proportion of the *value* of the thing recovered, and the latter is held to be allowable. *Ramsey v. Trent*, 10 B. Monr. (Ky.) 341; *Evans v. Bell*, 6 Dana (Ky.), 479. A purchase of an interest in property by an attorney, made *after* judgment has been obtained, is not forbidden by the laws of Louisiana. And where money is borrowed to make the purchase, the lender of the money is estopped from pleading illegality in the purchase, and thus retaining the property which had been conveyed, to himself, as security for the loan. *McMicken v. Perin*, 18 How. [U. S.] 507. And see *Walker v. Cuthbert*, 10 Ala. 213; *Floyd v. Goodwin*, 8 Yerg. (Tenn.) 483, 494; *Anderson v. Radcliffe*, El. Bl. & El. 806.

An agreement between the defendant in an ejectment suit, and his grantor, who was interested in maintaining his title, that the latter should take upon himself the defense of the suit, and indemnify the former against the same, is held not to be invalid on the ground of maintenance. *Goodspeed v. Fuller*, 46 Me. 141.

It has been held that where an attorney has made a bargain with his client, which is void on the ground of maintenance and champerty, he may, nevertheless, recover a reasonable compensation for his services on a *quantum meruit*. *Thurston v. Percival*, 1 Pick. 415; *Rust v. Larue*, 4 Litt. (Ky.) 417. But see *Halloway v. Lowe*, 7 Port. (Ala.) 488; *Low v. Hutchinson*, 37 Me. 196.

The New York statute, which prohibits attorneys from purchasing bonds, choses in action, etc., for the purpose of bringing suits upon them, has no application to a purchase of stock in a corporation. *Ramsey v. Gould*, 57 Barb. 398; S. C., 39 How. 62; 8 Abb. (N. S.) 174.

§ 4. **Who may interpose the defense.** See *ante*, pp. 68, 69, Art. 1, §§ 5, 6.

§ 5. **How interposed.** See *ante*, p. 70, Art. 1, § 7.

ARTICLE IV.

COMPOUNDING OFFENSES.

Section 1. Definition and nature. It is an old and well-settled doctrine of the common law, that the *compounding* of a criminal offense renders a contract wholly void. And, not only so, but an agreement not to give evidence, or to stifle a prosecution, is just as corrupt as an agreement to compound a felony or other crime, assuming that the word *compound* does not embrace all the acts which may be resorted to, to prevent, embarrass, or terminate a prosecution, in which sense it seems sometimes to be used. *Conderman v. Hicks*, 58 Barb. 165; S. C., 40 How. 71; 3 Lans. 108. In short, any contract which can prevent or impede the due course of public justice is to be deemed invalid. *Id.*; *Porter v. Havens*, 37 Barb. 343; *Bettinger v. Bridenbecker*, 63 id. 395; *Bills v. Comstock*, 12 Mete. 468; *Bowen v. Buck*, 28 Vt. 308. Every citizen is under an obligation to the public to abstain from voluntarily placing himself in a position in which it is to his pecuniary interest to suppress, stifle, or impede a public prosecution. *Gardner v. Maxey*, 9 B. Monr. (Ky.) 90; *Kimbrough v. Lane*, 11 Bush (Ky.), 556. Hence all contracts to discontinue criminal proceedings that are pending, and all agreements not to institute a criminal prosecution, and all agreements in any way to prevent or stifle such prosecutions, are declared to be immoral and illegal. *Id.*; *Conderman v. Hicks*, 58 Barb. 165; S. C., 40 How. 71; 3 Lans. 108; *Lindsay v. Smith*, 78 No. Car. 328; 24 Am. Rep. 463; *Partridge v. Hood*, 120 Mass. 403; 21 Am. Rep. 524; *Peed v. McKee*, 42 Iowa, 689; 20 Am. Rep. 631.

§ 2. **When it avoids a contract.** The general rule on the subject as usually stated is, that an agreement for suppressing evidence, or for stifling or compounding a criminal prosecution or proceeding for a felony, or for a misdemeanor of a public nature, as perjury or the like, is void. *Keir v. Leeman*, 6 Q. B. 308; S. C. affirmed, 9 id. 371; *Clubb v. Hutson*, 18 C. B. (N. S.) 414; 2 Chit. on Cont. (11th Am. ed.) 991. And cases cited *ante*, p. 79, § 1. The defense that a note or other obligation for money or property was given for an illegal consideration, is fully sustained by proof that it was founded upon an agreement to compound a felony (*Fivaz v. Nicholls*, 2 C. B. 501; *Chandler v. Johnson*, 39 Ga. 85; *Allison v. Hess*, 28 Iowa, 388; *Porter v. Jones*, 6 Coldw. [Tenn.] 313; *Peed v. McKee*, 42 Iowa, 689; 20 Am. Rep. 631); or a public misdemeanor (*Commonwealth v. Pease*, 16 Mass. 91; *Lindsay v. Smith*, 78 No. Car. 328; 24 Am. Rep. 463; *Bell v. Wood*, 1 Bay [S. C.], 249; *Prole v. Wiggins*, 3 Bing. N. C. 230. See *Fay v. Oatley*, 6 Wis. 55); or to conceal the commission of either (4 Black. Com. 120, 121); or to withhold evidence in relation thereto (*Badger v. Williams*, 1 D. Chip. [Vt.] 137); or to do any other act preventing or impeding the course of public justice. *Conderman v. Hicks*, 58 Barb. 165; S. C., 3 Lans. 108; 40 How. 71. Thus an agreement to discontinue a pending prosecution is as much an illegal consideration for a note, etc., as a contract not to prosecute. *Id.*; *Shaw v. Reed*, 30 Me. 105. See, also, *Grimes v. Hildenbrand*, 4 Hun (N. Y.), 354. A contract to indemnify another for committing a willful and malicious trespass, is void. *Ives v. Jones*, 3 Ired. (No. Car.) L. 538; *Davis v. Arledge*, 3 Hill (So. Car.), 170. An agreement to pay a sum of money to an officer for an escape from mere arrest, or from prison, or an agreement by a third person to indemnify an officer for neglecting his duty in the service of a precept, is void, as being founded on a consideration to do an illegal act. *Kenworthy v. Stringer*, 27 Ind. 498; *Hodsdon v. Wilkins*, 7 Me. 113; *Webber v. Blunt*, 19 Wend. 188; *Denny v. Lincoln*, 5 Mass. 385. A contract to indemnify a printer for publishing a libel is void (*Poplett v. Stockdale*, 2 Carr. & P. 198); so of a contract to reprint a literary work, in violation of a copyright secured to a third person (*Nichols v. Ruggles*, 3 Day [Conn.], 145); and it is a good defense to an action for not supplying manuscript to complete a work, according to agreement, that the matter of the intended publication is of an unlawful and indictable nature. *Gale v. Leekie*, 2 Stark. 107. And a promissory note given in consideration of the payee's forbearing to prosecute a charge against the maker, of obtaining money by false pretenses, is illegal and cannot be enforced. *Clubb v. Hutson*, 18 C. B. (N. S.) 414. The same has been held of a

note, given in pursuance of a contract to suppress an assault and battery. *Vincent v. Groom*, 1 Yerg. (Tenn.) 430; *Corley v. Williams*, 1 Bailey (So. Car.), 588. An agreement to pay a certain sum of money, on the commutation of the sentence of a convict, to a person efficient in obtaining such a commutation, was held to be contrary to public policy, and void. *Kribben v. Haycraft*, 26 Mo. 396. And see *Norman v. Cole*, 3 Esp. 253. So, an agreement by which one party receives a sum of money to become the bail of another accused of felony, in order that a defendant may be released from custody so as to escape trial, is void, as obstructing or interfering with the administration of public justice, and money paid under such an agreement cannot be recovered back. *Dunkin v. Hodge*, 46 Ala. 523. And money paid to a jailer, to procure the release of a prisoner on criminal process, without giving bail, is illegally paid, and cannot be recovered back. *Smart v. Cason*, 50 Ill. 195. It is likewise held that an agreement to deliver an execution debtor to an officer at a future day, in consideration of his forbearing to arrest the debtor, when in his presence and power, is void. *Fanshor v. Stout*, 1 South. (N. J.) 319; *Denny v. Lincoln*, 5 Mass. 385. So an agreement that a defendant in a proceeding for divorce shall withdraw his or her papers, and make no defense in the case, is held to be contrary to public policy, and void. *Stoutenburg v. Lybrand*, 13 Ohio St. 228.

A contract of sale induced in part by a desire on behalf of both vendor and purchaser, to cause certain promissory notes of the vendor to be paid, on which he has forged the names of persons as indorsers, and thereby to prevent a prosecution for the forgery, is illegal and void, and leaves the property subject to attachment by the vendor's creditors. *Laing v. McCall*, 50 Vt. 657.

§ 3. **When it does not.** It has been held that, in all cases of offenses which involve damage to an injured party, for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. *Keir v. Leeman*, 6 Q. B. 308; S. C. affirmed, 9 id. 371. And see *Stone v. Hooker*, 9 Cow. 154; *Plumer v. Smith*, 5 N. H. 553; *Price v. Summers*, 2 South. (N. J.) 578; *Bowen v. Buck*, 28 Vt. 308. A note with a surety given by a clerk in a post-office to secure the postmaster for funds embezzled by the clerk, on a promise not to prosecute the clerk criminally, is valid, and may be enforced against the surety. *Bibb v. Hitchcock*, 49 Ala. 468; 20 Am. Rep. 288. And to render a promise void on the ground that the consideration thereof was the stifling of a criminal prosecution, it is necessary that the promise should be made for gain, and not merely from

motives of kindness and compassion. *Commonwealth v. Pease*, 16 Mass. 91; *Ward v. Allen*, 2 Mete. (Mass.) 53. A compromise of a civil process, or of a private injury, is binding. *Pilkington v. Green*, 2 Bos. & Pul. 151; *Stonington v. Powers*, 37 Conn. 439. Hence a promise to pay money to one through whose land a road has been laid out, for withdrawing his opposition to opening it, is a valid consideration, on which an action may be sustained. *Weeks v. Lippencott*, 42 Penn. St. 474.

A promise to pay for services and expenses in procuring a pardon for a convict in the State prison is held to be binding. *Chadwick v. Knox*, 31 N. H. 226; *Bird v. Meadows*, 25 Ga. 251. But see *Norman v. Cole*, 3 Esp. 253. So, an agreement with one, jointly indicted with others, that in case he will testify fully and candidly, the facts will be presented to the court with a recommendation on the part of the prosecutor or prosecuting officer, that a *nolle prosequi* be entered as to him, is not against public policy, and is binding. *Nickelson v. Wilson*, 60 N. Y. (15 Sick.) 362. See, also, *People v. Whipple*, 9 Cow. 713; *United States v. Lee*, 4 McLean (C. C.), 103.

A client who, by threatening to arrest his attorney on a charge of larceny and embezzlement, has procured from him a note with security for the amount which he had collected and refused to pay over, may maintain an action on the note. The transaction is not compounding a criminal offense, although such refusal by an attorney to pay over is made by the statute a misdemeanor. And the case is not affected by the fact that the note would not have been given had not the principal maker been threatened with a criminal prosecution. *Ford v. Cratty*, 52 Ill. 313. See, also, *Legg v. Lyman*, 8 Blackf. (Ind.) 148.

An agreement between A and B that the former, the father of a girl who had been debauched and got with child by B, would take the child and its mother and support them, and discourage his daughter from prosecuting B, in consideration that B would convey him a tract of land, was held not to be immoral nor in violation of public policy. *Self v. Clark*, 2 Jones' (No. Car.) Eq. 309.

§ 4. **Who may make the defense.** See *ante*, pp. 68, 69, Art. 1, §§ 5, 6. It is clear from the cases cited, *ante*, pp. 65, 68 §§ 1, 2, that all agreements for suppressing evidence or compounding criminal prosecutions, felonies or misdemeanors, are void, as between the original parties. And it was held in an early case in South Carolina, that a note given to compound a felony is void by the common law, in the hands of an indorsee; for the reason that, being void in its original creation, for illegality and turpitude, it can never afterward be valid so as to charge the drawer. *Bell v. Wood*, 1 Bay (S. C.), 249. In this case, how-

ever, the note was indorsed after it became due; and this fact alone, independently of the above consideration, was sufficient to permit the parties to go into the consideration of the note in the hands of an indorsee, as well as if it had remained in the hands of the original payee. *Id.* And according to the recent decisions in New York, a promissory note, given to compound a felony, is not void in the hands of a *bona fide* holder for value, without notice, unless it is expressly declared void by statute. *Hill v. Northrup*, 4 N. Y. Sup. Ct. (T. & C.) 120; S. C., 1 Hun, 612; *Grimes v. Hillenbrand*, 4 *id.* 354; S. C., 6 N. Y. Sup. Ct. (T. & C.) 354; *Palmer v. Minar*, 8 Hun, 342.

§ 5. **How set up.** See *ante*, p. 70, Art. 1, § 7.

ARTICLE V.

GAMING.

Section 1. Definition and nature. Under the head of gaming the contract of wager will be chiefly considered in the present connection. A wager or bet is defined to be "a contract by which two or more parties agree that a certain sum of money, or other thing, shall be paid or delivered to one of them on the happening or not happening of an uncertain event." 2 Bouv. Diet. 647, 648. It has been held that, in order to constitute a wager, there must be a risk by both parties. *Quarles v. State*, 5 Humph. (Tenn.) 561. And see *Fisher v. Waltham*, 4 Q. B. 889; S. C., D. & M. 142. On the other hand, a contract upon a contingency by which one may lose, though he cannot gain, or the other may gain but cannot lose, as where property is sold at its real value, to be paid for if A be elected, is held to be a bet. *Shumate's case*, 15 Gratt. (Va.) 653. See, also, *Marean v. Longley*, 21 Me. 26; *Trammel v. Gordon*, 11 Ala. 656.

Wagers are not illegal, at common law, merely as wagers. They are only illegal when forbidden by some statutory provision, when they are calculated to injure third persons, and thereby disturb the peace and comfort of society, or when they militate against the morality or sound policy of the State. *Good v. Elliott*, 3 Term R. 693; *Moon v. Durden*, 2 Exch. 23; *Thackoorseydass v. Dhondmull*, 6 Moore's P. C. C. 300; *Pettamberdass v. Thackoorseydass*, 7 *id.* 239; *Hasket v. Wootan*, 1 Nott. & M. (So. Car.), 180. An action will, therefore, lie at common law upon a contract of wager, unless it be affected by some special cause of invalidity. *Id.*; *Johnson v. Fall*, 6 Cal. 359; *Johnston v. Russell*, 37 *id.* 670; *Bailes v. Williams*, 15 Tex. 318. The courts have, however, frequently reprehended these contracts, and expressed their regret that they have ever been sanctioned. See *Gil-*

bert v. Sykes, 16 East, 150; *Fisher v. Waltham*, 4 Ad. & El. (N. S.) 889; *Evans v. Jones*, 5 Mees. & W. 82. In this country especially, the courts have expressed their views upon the subject of wagers generally, in very strong language. See *Amory v. Gilman*, 2 Mass. 6; *Laval v. Myers*, 1 Bail. (So. Car.) 486; *Wheeler v. Spencer*, 15 Conn. 30. In New Hampshire and Vermont, the common-law rule allowing actions to be maintained upon a wager, in cases not contrary to public policy, or prohibited by statute, was never adopted, and all wager contracts are void. *West v. Holmes*, 26 Vt. 530; *Winchester v. Nutter*, 52 N. H. 507; S. C., 13 Am. Rep. 93. See, also, *Rice v. Gist*, 1 Strobl. (So. Car.) 82; *Lewis v. Littlefield*, 15 Me. 233; *Harding v. Walker*, 1 Hempst. 53; *Thomas v. Cronise*, 16 Ohio, 54. In Minnesota the courts give full scope to the broad principle, that contracts contrary to good morals, and sound policy, are invalid, and that, therefore, wagers, as contracts of that character, are not to be sustained. *Wilkinson v. Tousley*, 16 Minn. 299; S. C., 10 Am. Rep. 139. Wagers are still recoverable in California and Texas, when not prohibited by statute, or unless they are of a nature to be prejudicial to the public interest, or the character and happiness of individuals. *Johnston v. Russell*, 37 Cal. 670; *Wheeler v. Friend*, 22 Tex. 683. And such likewise appears to be the rule in some of the other States. *Smith v. Smith*, 21 Ill. 244; *Trenton, etc., Ins. Co. v. Johnson*, 4 Zab. (N. J.) 576; *Deweese v. Miller*, 5 Harr. (Del.) 347. But the uniform tendency of the later American decisions is, to treat all gaming contracts and all wagers as utterly void. See *Monroe v. Smelly*, 25 Tex. 586.

§ 2. **When it avoids a contract.** We have seen, in the preceding section, that wagers which are contrary to public policy, or of a nature to wound or prejudice the feelings or interests of individuals, are essentially void and cannot be made the ground of an action. Upon the ground first stated, it is settled by all the cases where the question has arisen, that wagers upon the result of public elections are illegal and void. *Wroth v. Johnson*, 4 Har. & M. (Md.) 284; *Bunn v. Riker*, 4 Johns. 426; *Stoddard v. Martin*, 1 R. I. 1; *Murdock v. Kilbourn*, 6 Wis. 468; *Worthington v. Black*, 13 Ind. 344; *Conner v. Ragland*, 15 B. Monr. (Ky.) 634; *Hill v. Kidd*, 43 Cal. 615; *Wheeler v. Spencer*, 15 Conn. 28; *Allen v. Hearn*, 1 Term R. 56. And, upon both the grounds stated above, it was laid down as a general rule by the supreme court of Pennsylvania, that every bet about the age, or height, or weight, or wealth, or circumstances, or situation, of any person, is illegal, and that no court ought, in any case, to sustain a suit on such wager, and this, whether the subject of the bet be

man, woman or child, married or single, native or foreigner, in this country or abroad. *Phillips v. Ives*, 1 Rawle (Penn.), 36, 42. See, also, *Eltham v. Kingsman*, 1 B. & Ald. 684; *Ditchburn v. Goldsmith*, 4 Camp. 152; *DeCosta v. Jones*, Cowp. 729; *Gilbert v. Sykes*, 16 East, 150; *Shirley v. Sankey*, 2 Bos. & Pul. 130. A wager as to the conviction or the acquittal of a prisoner on trial, on a criminal charge, is illegal, as being against public policy. *Evans v. Jones*, 5 Mees. & W. 77. A wager as to the event of a cock-fight (*Squires v. Whisken*, 3 Camp. 140), or a sparring match (*Eagerton v. Furzeman*, 1 Carr. & P. 613), or whether a horse can trot eighteen miles within an hour (*Brogden v. Marriatt*, 3 Bing. N. C. 88), are held to be illegal, as tending to create disturbances and to encourage cruelty. *Id.*

In Minnesota a wager upon the result of a horse-race is held to be illegal and invalid, as against good morals and sound public policy. *Wilkinson v. Tousley*, 16 Minn. 299; S. C., 10 Am. Rep. 139. See, also, *Hoit v. Hodge*, 6 N. H. 104; *Morgan v. Beaumont*, 121 Mass. 7. But see § 3, *post*, p. 86. And, horse-trotting or horse-racing is a game within the statute to prevent gaming, in many of the States. See *Boynton v. Curle*, 4 Mo. 599; *McLain v. Huffman*, 30 Ark. 428; *Tatman v. Strader*, 23 Ill. 493; *Ellis v. Beale*, 18 Me. 337; *McKeon v. Caherty*, 1 Hall (N. Y.), 300; *Gibbons v. Gouverneur*, 1 Denio, 170. And giving a charter for a race-course, for the purpose of racing, does not legalize betting on the race-course. *Cain v. McHarry*, 2 Bush (Ky.), 263. And where a contract of wager is illegal, either under a statute or at common law, the illegality will extend to all antecedent contracts made in aid of or to effectuate the illegal purpose. *Collins v. Merrell*, 2 Mete. (Ky.) 163; *Tatum v. Kelley*, 25 Ark. 209; *Mosher v. Griffin*, 51 Ill. 184; *Watson v. Fletcher*, 7 Gratt. (Va.) 1. And also to all which may be founded on it subsequently. *Bevil v. Hix*, 12 B. Monr. (Ky.) 140; *Williams v. Wall*, 60 Mo. 318; *Bettis v. Reynolds*, 12 Ired. (No. Car.) 344; *Finn v. Barclay*, 15 Ala. 626.

Wager policies of insurance, that is, policies effected by parties having no interest in the subject of insurance, are prohibited by statute in England, and are generally void in this country, either by express statutory enactment, or under the course of decisions. See *Ruse v. Mutual, etc., Ins. Co.*, 23 N. Y. (9 Smith) 516; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; Vol. 4, p. 23 *et seq.*

What is usually called an "option contract" is a wager. *Waterman v. Buckland*, 1 Mo. App. 45. Thus, a contract for the sale and future delivery of goods, by which the seller has the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for the goods, as each may choose, and which, on its maturity, is to be filled

by adjusting the differences in the market value, is in the nature of a gambling transaction, and the law will not tolerate it. *Id.* ; *Pickering v. Cease*, 79 Ill. 328 ; *Lyon v. Culbertson*, 83 id. 33 ; *Rumsey v. Berry*, 65 Me. 570 ; *Rourke v. Short*, 34 Eng. L. & Eq. 219. And see *Bigelow v. Benedict*, 70 N. Y. (25 Sick.) 202 ; *Story v. Salomon*, 71 N. Y. (26 Sick.) 420.

It has been held that a contract of wager which is valid in the State where it is made, may be enforced in another where it would have been void. *Thomas v. Davis*, 7 B. Monr. (Ky.) 227, 231. But this rule has no application where the wager is a fraud on the laws or policy of the State where the action is brought, although made beyond its boundaries. And, therefore, where two persons domiciled in Vermont, went into Canada for the purpose of making a wager in reference to the result of a presidential election, then pending in the United States, and while there, made the wager, it was held in Vermont, that the contract must be treated as illegal, by the courts of that State, to the same extent that it would have been if made within the State. *Tarleton v. Baker*, 18 Vt. 9.

A bet, regarded as a contract, is totally void, where there has been no deposit of the thing bet. *Waters v. Hixenbaugh*, 25 Penn. St. 131.

§ 3. **When it does not.** It is a well-settled doctrine, that wagers upon indifferent matters, without other interest to either party than results from the wager, are legal at common law, unless founded on immoral, indecent, or illegal transactions, and may be recovered if fairly won. *Good v. Elliott*, 3 Term R. 693 ; *Edgell v. McLaughlin*, 6 Whart. (Penn.) 176 ; *Morgan v. Richards*, 1 Browne (Penn.), 171 ; *ante*, § 1, pp. 83, 84. But see *Hoit v. Hodge*, 6 N. H. 104. A wager that a railroad will be completed within a certain time is not prohibited by the common law, and a recovery can be had upon it. *Beadles v. Bless*, 27 Ill. 320. So, a wager whether or not a certain person had bought a wagon before a certain day, was held to be legal, and the winner was allowed to recover against the loser the amount of the wager. *Good v. Elliott*, 3 Term R. 698. A contract to run a horse-race is not prohibited by law, and money lost in such a race may be recovered by action in the Louisiana courts. *Grayson v. Whatley*, 15 La. Ann. 525. So, an action on a wager upon a horse-race is maintainable in Texas (*Kirkland v. Randon*, 8 Tex. 10), and all contracts subsidiary and incident to the wager are valid also ; as, for instance, the contract to forfeit in case of failure to run the race. *Id.* ; *Wheeler v. Friend*, 22 Tex. 683. But in a suit for a bet on a horse-race, the loser can defend if there was fraud in running the race, though the plaintiff was ignorant of the fraud. *Bass v. Peevey*, 22 id. 295. See, also,

Monroe v. Smelly, 25 id. 586. Horse-racing for a wager being in violation of the Illinois law, an action will not lie to recover for services rendered in training a horse for a race. *Mosher v. Griffin*, 51 Ill. 184. It is held in Delaware, that a wager on a horse-race, out of the jurisdiction of the State, is not illegal (*Ross v. Green*, 4 Harr. [Del.] 308); and in Illinois, that a wager on the result of a presidential election in another State, made after the vote has been cast, is not against public policy. *Smith v. Smith*, 21 Ill. 244.

A purchase of grain at a certain price per bushel, made in good faith, to be delivered in the next month, giving the seller until the last day of the month, at his option, in which to deliver, is not an illegal or gambling contract, and the purchaser will be entitled to its benefit, no matter what may have been the secret intention of the seller. *Pixley v. Boynton*, 79 Ill. 351; *Rumsey v. Berry*, 65 Me. 570. See § 2, *ante*, p. 84. A purchase of cotton for future delivery, by a broker for his principal, is not in contravention of the statute against betting and gaming, unless it appears that it was intended to lay a wager. *Kingsbury v. Kirwin*, 11 J. & Sp. 451.

It is no defense to an action for work and labor done and materials furnished in fitting up a house, that the plaintiff knew at the time that the house was to be used for gambling purposes. *Michael v. Bacon*, 49 Mo. 474; S. C., 8 Am. Rep. 138. If the merchant is not to be paid out of the illicit gains of a gambler, and is not connected by contract with the object the gambler has in view, his knowledge of the purpose does not vitiate the sale. *Id.* See *ante*, Art. 2, § 3, p. 71. In arranging for a squirrel hunt, an agreement that the defeated party shall pay for the suppers of the successful party, is valid, and the person furnishing the supper may recover for it from the defeated party who had ordered it. *Winchester v. Nutter*, 52 N. H. 507; 13 Am. Rep. 93.

§ 4. **Who may interpose the defense.** See *ante*, pp. 68, 69, Art. 1, §§ 5, 6; also below, § 6.

§ 5. **How interposed.** See *ante*, p. 70 Art. 1, § 7.

§ 6. **Recovery of money lost.** By the common law, the winner cannot recover money won at play. *Carrier v. Brannan*, 3 Cal. 328; *Scott v. Courtney*, 7 Nev. 419. And equity will relieve against a judgment founded on a gaming debt, though the defendant failed to make the defense at law. *Manning v. Manning*, 8 Ala. 138; *Lucas v. Waul*, 20 Miss. 157; *Skipwith v. Strother*, 3 Rand (Va.) 214. See *contra*: *Dunn v. Holloway*, 1 Dev. (No. Car.) Eq. 322. So, a note or other security given in consideration of money won at gaming, is void, (*Monroe v. Smelly*, 25 Tex. 586; *Conner v. Mackey*, 20 id. 747), even in the hands of an innocent holder for a valuable consideration (*Unger*

v. *Boas*, 13 Penn. St. 601; *Harmon v. Boyce*, 2 Treadw. [So. Car.] Const. 200; *Holman v. Ringo*, 36 Miss. 690; *Chapin v. Dake*, 57 Ill. 295; S. C., 11 Am. Rep. 15), unless he was induced to take it by the representations of the maker. *Manning v. Manning*, 8 Ala. 138; *Ivey v. Nicks*, 14 id. 564. See *Fuller v. Hutchings*, 10 Cal. 523. And, a plea that a note was for money won at gaming, need not state the kind of game. *Jordan v. Locke*, Minor (Ala.), 254. Where one obtains a bond of the obligee by gaming, and collects a part of it of the obligor, who gives a new bond for the balance, such new bond is invalid, as being without consideration. *Stone v. Mitchell*, 7 Ark. 91. So a bond taken on the compromise of an action upon a gaming contract is void, if money won at an illegal game is part of the consideration. *Turner v. Peacock*, 2 Dev. (No. Car.) L. 303. It has however been held that, where a person, who has lost money at gaming, gives his note to a third person, who thereupon pays an adequate consideration to the winner, the note is not void. *Jones v. Sevier*, 1 Litt. Ky.) 50. See also, *Mooring v. Stanton*, Mart. (No. Car.) L. 52.

It would seem that, under the English statutes, money lent for the purpose of gaming is now recoverable, unless lent when the gaming is unlawful, as by a licensed publican to game on his own premises (*Foot v. Baker*, 5 Man. & Gr. 335); and money lent for the purpose of paying losses on gaming may be recovered (*Hill v. Fox*, 4 Hurl. & N. 359. See *Rosewarne v. Billing*, 15 C. B. [N. S.] 316; *Coombes v. Dibble*, L. R., 1 Exch. 248); and gaming debts contracted abroad, where gaming is not illegal, are recoverable in England. *Quarrier v. Colston*, 1 Ph. 147.

Money lost at play, and paid over to the winner, cannot be recovered back by the loser, because the parties are *in pari delicto*. *Adams v. Barrett*, 5 Ga. 404; *Babcock v. Thompson*, 3 Pick. 446; *Gill v. Webb*, 4 T. B. Mour. (Ky.) 299; *Welsh v. Cutler*, 44 N. H. 561. And for the same reason, it has been held that an action will not lie to recover back money lost on an illegal bet or wager and paid over to the winner (*Id.*; *Danforth v. Evans*, 16 Vt. 538; *McCullum v. Gourlay*, 8 Johns. 147; *Thrift v. Redman*, 13 Iowa, 25; *Tindall v. Childress*, 2 Stew. & P. [Ala.] 250; *Hudspeth v. Wilson*, 2 Dev. [No. Car.] L. 372; *Meech v. Stoner*, 19 N. Y. [5 Smith] 26); though it is otherwise, by statute, in many of the States. *Id.*; *Lear v. McMillen*, 17 Ohio St. 464; *Samuels v. Ainsworth*, 13 Ala. 366; *Nealy v. Powell*, 20 Ark. 163. But it was held in Indiana, that if goods are won on a wager respecting the result of a presidential election, and are delivered to the winner, the loser cannot, either at common law or under the statute, sustain an action against the winner for the price of the goods. *M'Hatton v.*

Bates, 4 Blackf. (Ind.) 63. So in Illinois. *Gregory v. King*, 58 Ill. 169; 11 Am. Rep. 56, 58, note. But see *Hook v. Boteter*, 3 Harr. & M. (Md.) 348. That money knowingly lent to be used in betting cannot be recovered by the lender from the borrower. See *Machir v. Moore*, 2 Gratt. (Va.) 257; *Mordecai v. Dawkins*, 9 Rich. (So. Car.) 262; *Morgan v. Groff*, 5 Denio, 364; *Ruckman v. Bryan*, 3 id. 340. But see *contra*, *Carsan v. Rambert*, 2 Bay (So. Car.), 560.

The indorsement of a draft by the owner, in payment of a gambling debt, although the paper was issued prior to the incurring of the debt, and for a legal consideration, comes within the inhibition of the Missouri gaming act; and in contemplation of that statute, the indorsed draft may be treated as a security or a new bill. Such indorsement under the statute is void and conveys no title; and where the draft is assigned or transferred, by the party receiving it, to another, also cognizant of the facts, who collects the amount, he will be held to have converted the instrument and its proceeds, and will be liable to the owner for the sum collected. *Williams v. Wall*, 60 Mo. 318.

The stakeholder of money bet on a turf-race is entitled to recover it of a person with whom he has deposited it, though, as between the parties betting, the wager may be illegal and void. *Perkins v. Clemm*, 23 Ark. 221.

§ 7. **Recovery from stakeholder.** We have seen in the preceding section, that neither money won and not paid, nor money lost and actually paid to the winner can be recovered. In such an action the plaintiff is confronted and defeated by the maxim *in pari delicto, potior est conditio possidentis*. *Ante*, pp. 87, 88, § 6. But in illegal transactions the money may always be stopped while it is *in transitu* to the person who is entitled to receive it. *Edgar v. Fowler*, 3 East, 225. Hence, it is the established rule in England, that either party may disaffirm the wager, and recover the money staked by him, even when it is in the possession of the opposite party, at any time before the event upon which the wager was made has transpired; and against a stakeholder, if there be one, at any time before the money has been actually paid to the winner, either before or after the event has transpired, and even after the money has been paid to the winner, if, before the payment, the stakeholder was notified not to pay it, for the reason that the contract is not executed, as the courts hold, until the stakeholder has paid the stakes to the winner. *Cotton v. Thurland*, 5 Term R. 405; *Howson v. Hancock*, 8 id. 575; *Hastelow v. Jackson*, 8 Barn. & C. 221; *Smith v. Bickmore*, 4 Taunt. 474. See, also, *Garrison v. McGregor*, 51 Ill. 473; *Adkins v. Flemming*, 29 Iowa, 122; *Wilkinson v. Tousley*, 16 Minn. 299; S. C., 10 Am. Rep. 139; *Hale v. Sherwood*, 40 Conn.

332; S. C., 16 Am. Rep. 37. In Massachusetts, one party to a wager who receives the money of the other from the stakeholder after he has been forbidden to receive it, and after the stakeholder has been forbidden to pay it, is liable to that other in an action for money had and received, although he is the winner of the wager, and although the money received by him is not the identical money deposited with the stakeholder. *Love v. Harvey*, 114 Mass. 80. It is held in Pennsylvania, that a deposit of money bet, with a stakeholder, raises an implied assumpsit on his part to refund it to the owner on demand, unless he has paid it over to the winner without notice to do so from the loser. *Siegal v. Funk*, 3 Pittsb. (Penn.) 28. And see *McLain v. Huffman*, 30 Ark. 428. In Delaware, the losing party to an illegal wager may, without a previous demand, maintain an action for money had and received, against a stakeholder who has paid it over to the winner without the loser's consent. *Pearce v. Provost*, 4 Houst. (Del.) 467. In an early case in New York, the law was declared to be that either party might disaffirm the wager and recover his stake of the stakeholder at any time before the happening of the event upon which the wager was made, but that the loser could not recover of the stakeholder after the event had happened and he had lost his money; that, in that case, as to him, the wager had become an executed contract, and his repentance had come too late. *Yates v. Foot*, 12 Johns. 1. This decision has remained the settled law of the State upon this subject, except so far as the matter has since been modified by statute. See *Morgan v. Groff*, 4 Barb. 524; *Pulver v. Burke*, 56 id. 390. And the same rule has been adopted in California. *Johnston v. Russell*, 37 Cal. 670. See, also, *Guthman v. Parker*, 3 Head (Tenn.), 233; *Humphreys v. Magee*, 13 Mo. 435. The general doctrine, well supported by the authorities, is that the contract between the parties to the wager being void, the stakeholder is held to be the mere agent or bailee of the respective parties, and he holds the money deposited with him subject to their orders. If his authority be not revoked, he may pay it over to the winner without rendering himself liable to an action; but if his authority be revoked by either party before he pays the money over to the winner, he must then return the money to the parties respectively who deposited it with him, and he cannot legally pay it to any one else. *Cleveland v. Wolff*, 7 Kans. 184. And see *Huncke v. Francis*, 27 N. J. Law, 55; *Bledsoe v. Thompson*, 6 Rich. (So. Car.) 44; *Perkins v. Hyde*, 6 Yerg. (Tenn.) 288; *Burroughs v. Hunt*, 13 Ind. 178; *Stevens v. Sharp*, 26 Ill. 404; *McAllister v. Hoffman*, 16 Serg. & R. (Penn.) 147; *Fisher v. Hildreth*, 117 Mass. 558; *Wilkinson v. Touseley*, 16 Minn. 299; 10 Am. Rep. 139.

Notice to the stakeholder not to pay over money deposited in his hands must come from the owner of the money. It is not sufficient that it comes from the agent of the owner who made the bet and deposited the money. *Reichly v. Maclay*, 2 Watts & Serg. (Penn.) 59. The share of each depositor, while in the hands of the stakeholder, is subject to attachment for his debts at any time before it is paid over. *Ball v. Gilbert*, 12 Mete. 397. And it is immaterial as it respects the application of these general principles, whether the depositor borrowed the money for the purpose of making an illegal bet, and the matter cannot be inquired into. *Reynolds v. McKinney*, 4 Kans. 94.

Under the Revised Statutes of New York, the losing party in an illegal bet or wager may recover from the stakeholder the sum deposited by him, although the stakeholder, by his direction, given immediately after the wager is determined, has paid the money over to the winner. *Mahony v. O'Callaghan*, 6 Jones & Sp. (N. Y.) 461; *Storey v. Brennan*, 15 N. Y. (1 Smith) 524. The plaintiff staked his watch and chain on the throw of the dice, and lost, by reason of a trick or cheat on the part of his adversary. The stakeholder delivered the property to the winner, who sold it for value, and without notice, to the defendant. In an action of replevin it was held that no title passed to the winner which he could convey to a purchaser, and that the plaintiff could recover the property of the defendant. *Hodge v. Sexton*, 1 Hun (N. Y.), 576; S. C., 4 N. Y. Sup. Ct. (T. & C.) 54.

In an action by a party to an illegal wager on a horse-race, to recover the deposit from the stakeholder, an answer seeking to recoup expenses for the race-ground, and a declaration in set-off, cannot be sustained, the agreement therefor being distinct from the wager. *Morgan v. Beaumont*, 121 Mass. 7. So, in an action to recover of a stakeholder money deposited by the plaintiff with the defendant, on a wager upon the event of a horse-race, the defendant cannot set off a deposit made by him with the plaintiff on another wager of a similar character. His remedy is by action only. *Bevins v. Reed*, 2 Sandf. (N. Y.) 436.

It is held in New Jersey that when an act makes wagers on horse-races and the holding of stakes criminal offenses, one who has deposited money with a stakeholder cannot recover it, although the race has not come off. *Sutphin v. Crozer*, 32 N. J. Law, 462.

ARTICLE VI.

CONTRACTS AGAINST PUBLIC POLICY.

Section 1. Definition and nature. Contracts contrary to public policy are such as injuriously affect or subvert the public interest, or

such as by their terms or contemplated manner of performance must work some mischief affecting the body politic. And it is a well-established principle, that all contracts which are opposed to public policy and to open, upright and fair dealing, are illegal and void. *Roche v. O'Brien*, 1 Ball & B. 338; *Clippinger v. Hepbaugh*, 5 Watts & Serg. 315; *Gulick v. Ward*, 5 Halst. (N. J.) 87; *Frost v. Inhabitants of Belmont*, 6 Allen, 152. And if a contract be void, as against the policy of the law, the court will neither enforce it while executory, nor relieve a party from loss by having performed it in part. *Footte v. Emerson*, 10 Vt. 344. See *Quirk v. Thomas*, 6 Mich. 76; *Piatt v. Oliver*, 2 McLean (C. C.), 277; *Hanson v. Power*, 8 Dana (Ky.), 91. A promise of a married man to a single woman to marry her when a divorce should be decreed between himself and his wife, in a suit then pending, is contrary to public policy and void. 39 N. J. (10 Vroom) 133; 23 Am. Rep. 213.

The coercive power of the law is withheld, to compel the performance of any contract, *inter partes*, which has for its object the commission of a public offense or wrong, although not, *per se*, criminal. *Sedgwick v. Stanton*, 14 N. Y. (4 Kern.) 289. And see *Reynolds v. Nichols*, 12 Iowa, 398. And where an entire agreement contains an element which is legal and one which is void, being against public policy, the legal consideration cannot be separated from that which is illegal and void, so as to found an action on the legal consideration. *Rose v. Truax*, 21 Barb. 361.

But a contract void as against the policy of the law cannot affect a previous fair and lawful contract in relation to the same subject. *Britt v. Aylett*, 11 Ark. 475. If, however, a plaintiff asks the enforcement of an illegal contract, executed in consideration of a previous legal one, courts will dismiss the suit upon grounds of public policy. Nor can the plaintiff recover the amount due upon the first contract. *Cate v. Blair*, 6 Coldw. (Tenn.) 639.

In general, when both parties to a contract, void as against public policy, are equally at fault, the law will leave them where it finds them. If the contract be still *executory*, it will not enforce it, nor award damages for its breach. If already *executed*, it will not restore the price paid nor the property delivered. *Setter v. Alvey*, 15 Kans. 157.

But in order to make a contract unlawful as being against public policy or law, it must be manifestly and *directly* so; and it is not sufficient that the contract is connected with some violation of the law, however remotely or indirectly. *Bier v. Dozier*, 24 Gratt. (Va.) 1.

§ 2. **What are such contracts.** The cases where the doctrine of

public policy has been most frequently applied are, in respect to contracts made in restraint of trade, of marriage, those which affect injuriously the legislation of the State or the administration of justice, wager contracts and contracts affecting the public morals. Contracts of the character last mentioned have been noticed in preceding articles, and those falling under other heads mentioned will be considered under separate articles hereafter. In illustration of the general doctrine, a variety of instances are here given of agreements which have been held to be void, as being contrary to public policy. An agreement never to set up the statute of limitations as a defense to a note (*Crane v. French*, 38 Miss. 503); an agreement to withdraw the plea of usury (*Clark v. Spencer*, 14 Kans. 398; 19 Am. Rep. 96); an agreement for compensation to procure a contract from the government to furnish its supplies (*Tool Co. v. Norris*, 2 Wall. 45); an agreement to pay money in consideration that the promisee would influence the military authorities to allow the promisor to avail himself of certain privileges to which he is entitled (*Hutchen v. Gibson*, 1 Bush [Ky.], 270); an agreement to pay one-half of the proceeds of an illegal agreement (*Belding v. Pitkin*, 2 Caines [N. Y.], 147); an agreement guaranteeing to pay a sum of money to certain persons, provided they will petition the common council of a city for street improvements (*Maguire v. Smock*, 1 Wils. [Ind.] 92; S. C. affirmed, 42 Ind. 1; S. C., 13 Am. Rep. 353); a contract by a railroad company not to have or use a depot within a certain distance of a specified place (*St. Joseph, etc., R. R. Co. v. Ryan*, 11 Kans. 602; 15 Am. Rep. 357); a contract to locate a railroad depot upon the plaintiff's land and at no other point in the town (*Marsh v. Fairbury, etc., R. R. Co.*, 64 Ill. 414; 16 Am. Rep. 564); a contract not to build any railroad station within three miles of a specified place (*St. Louis, etc., R. R. Co. v. Mathers*, 71 Ill. 592; 22 Am. Rep. 122); a contract by the president and directors of a railroad company for the purchase of claims against the company (*McDonald v. Haughton*, 70 No. Car. 393); a contract for the sale and transfer of the property and franchise of a railroad company, before its road has been completed (*Clarke v. Omaha, etc., R. R. Co.*, 5 Neb. 314); a contract between two individuals for the purchase and sale of timber standing on government land (*Stevens v. Perrier*, 12 Kans. 297); a contract not to bid at a judicial sale (*Hook v. Turner*, 22 Mo. 333); an agreement not to bid for the labor of the inmates of a house of correction (*Gibbs v. Smith*, 115 Mass. 592); an agreement tending to prevent competition at a sale on execution (*Thompson v. Davies*, 13 Johns. 112); all combinations, having for their object to stifle fair competition at the bid-dings at auction sales (*Gardiner v. Morse*, 25 Me. 140; *Wilbur v.*

How, 8 Johns. 444; *Edwards v. Estell*, 48 Cal. 194; *Ingram v. Ingram*, 4 Jones' [No. Car.] L. 188; *Hunt v. Frost*, 4 Cush. 54; a contract for the sale of an office (*Eddy v. Capron*, 4 R. I. 394); a contract between two officers in the mail service of the United States, the consideration of which was an exchange of offices between them (*Stroud v. Smith*, 4 Houst. [Del.] 448); an agreement between two applicants for an office, that one of them shall withdraw his application and aid the other in procuring the appointment, in consideration of which the fees and emoluments of the office are to be divided between them (*Gray v. Hook*, 4 N. Y. [4 Comst.] 449; *Hunter v. Nolf*, 71 Penn. St. 282); an agreement between the proprietor of a distillery and an officer of the internal revenue service charged with watching the distillery, that the officer will pay the proprietor a monthly sum, so long as the latter carries on the distillery (*Caton v. Stewart*, 76 N. Car. 357); an agreement to limit a party's responsibility in damages for a future offense against another's good name (*Hayes v. Hayes*, 8 La. Ann. 468); a promise by an individual to pay rent in consideration of a grant to him by the board of supervisors of a county of a franchise to collect tolls on a public highway (*El Dorado County v. Davison*, 30 Cal. 520); an agreement on the part of a turnpike corporation to grant to individuals the privilege of passing the gate free of toll, in consideration that they would withdraw their opposition to a legislative act touching the alteration of the road (*Pingry v. Washburn*, 1 Aik. [Vt.] 264); an agreement by which one bound himself to settle on vacant lands, and procure a title, and then convey it to another (*M'Dermed v. M'Castland*, Hard. [Ky.] 21. And see *Edwards v. Batts*, 5 Yerg. [Tenn.] 441; *Glenn v. Mathews*, 44 Tex. 400); an employment to sell tickets in a foreign lottery (*Rolfe v. Delmar*, 7 Robt. [N. Y.] 80; *Negley v. Devlin*, 12 Abb. [N. S. N. Y.] 210); a contract of sale of stock of a corporation, which necessarily implies that the seller intended to derive, and the buyer to give him a private advantage not shared by the other stockholders, in consideration of his election as treasurer (*Guernsey v. Cook*, 120 Mass. 501); a promise of a married man to marry when a divorce should be decreed between himself and his wife in a suit then pending (*Noice v. Brown*, 39 N. J. Law, 133; S. C., 23 Am. Rep. 212); a promise to pay the debt of a third person, in consideration that his creditor would abstain from instituting proceedings to have him declared a bankrupt, the creditor having, at the time the promise was made, no right to proceed in bankruptcy against the debtor (*Ecker v. McAllister*, 45 Md. 290); a contract to convey land in consideration that the purchaser should serve in the Confederate army as a substitute (*Lance v. Hunter*, 72 No. Car. 178; 21 Am. Rep.

454); a stipulation that one shall, in consideration of a large sum of money, not only procure witnesses, but procure them to swear to a particular fact (*Patterson v. Donner*, 48 Cal. 369, 379); a contract by one physician licensing another to personate him in the practice of medicine in the office of the former for a given time (*Jerome v. Bigelow*, 66 Ill. 452; 16 Am. Rep. 597); a contract entered into upon representations that a person would or could be appointed to a position of public trust (*Haas v. Fenlon*, 8 Kans. 601); an agreement connected with a contract to pay money for the privilege of putting recruits into a regiment (*Neustadt v. Hall*, 58 Ill. 172); an agreement between S., a drafted man, and the master of T., an apprentice, to pay the master a sum of money to consent to the enlistment of T., as S.'s substitute (*Turner v. Smithers*, 3 Houst. [Del.] 430); a contract to procure for a drafted man a substitute, "or otherwise clear him from said draft" (*O'Hara v. Carpenter*, 23 Mich. 410; 9 Am. Rep. 89. See, also, *Skeels v. Phillips*, 54 Ill. 309); a contract to pay for services in the nature of brokerage in negotiating marriage (*Boyton v. Hubbard*, 7 Mass. 112; *Crawford v. Russell*, 62 Barb. 92); and it is held that a promise to pay a debt due by an applicant to be declared a bankrupt, in consideration that the payee will withdraw his objections in the bankrupt court to the discharge of the bankrupt, is illegal and void, and no action can be sustained upon it. *Austin v. Markham*, 44 Ga. 161. A contract for building a school-house will be void if the contractor is a director of the school district, and acts as one of the board which let the contract. *Pickett v. School District*, 25 Wis. 557; 3 Am. Rep. 105. So, of a contract forming a combination, in violation of a statute, for putting in bids for canal work, and it will not be enforced as between the parties thereto. *Woodworth v. Bennett*, 43 N. Y. (4 Hand) 273; 3 Am. Rep. 706.

The defendant, desiring to marry against the wish of his father, and being threatened with disinherison, entered into a verbal agreement with the plaintiff, his sister, that in case the father should will his entire property to either, that one would divide with the other. The entire property was afterward willed to the defendant, and it was held that the agreement was against public policy, and that a bill for specific performance would not lie. *Mercier v. Mercier*, 50 Ga. 546; S. C., 15 Am. Rep. 694. See, also, *Gordon v. Gordon*, 3 Swanst. 400.

The plaintiff, being in the employ of the defendants, entered into a contract with the United States, in his own name, for their benefit, and they became his sureties, and it was held that the contract was against public policy, and void. *Ashburner v. Parrish*, 81 Penn. St. 52.

The rule that mere knowledge by the seller of the buyer's intention to use the goods purchased for an unlawful purpose, does not invalidate the contract, has no application to a case where the contract is so connected with an illegal transaction or purpose, as to be *inseparable* from it. Hence, where the payee of a note, sold in consideration thereof, guns, which he knew would be used in aid of the rebellion against the government, it was held that he concurred with and actively promoted the treasonable purpose of the buyer, and that he could not recover upon the note. *Tatum v. Kelley*, 25 Ark. 209.

And where a contract belongs to a class which is reprobated by public policy, it will be declared void, although in that particular instance no injury to the public may have resulted. *Firemen's Association v. Berghaus*, 13 La. Ann. 209. A marriage brokerage contract is void as being against public policy. *Crawford v. Russell*, 62 Barb. 92.

Where one producer of a commodity, for the purpose of enhancing the price, enters into a contract with another producer, binding the latter to withhold and keep out of the market his supply, such contract is against public policy and void. *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. (23 Sick.) 558; 23 Am. Rep. 190. A contract between two persons not to bid against each other for a government contract to be given to the lowest bidder, and to share the profits of the contract when given to one of them, is void as against public policy, and an action to account for profits made by one of them, who got the contract, cannot be maintained. *King v. Winants*, 71 No. Car. 469; 17 Am. Rep. 11, note 15.

§ 3. **What are not such contracts.** Public interest and policy justify the offering of rewards, by individuals and government, to excite greater diligence and exertion in the apprehension of criminals, and the execution of the criminal law. *Bledsoe v. Jackson*, 4 Sneed (Tenn.), 429. An offer to pay a reward for the conviction of the perpetrator of a specified crime is not, therefore, contrary to public policy. *Furman v. Parke*, 21 N. J. Law, 310. Nor is the employment of counsel to assist the official attorney in a criminal prosecution against public policy; and the law will imply a promise by the employer to pay for such service. *Price v. Caperton*, 1 Duv. (Ky.) 207. And although an agreement among several, to stifle competition at a public sale, with a design of purchasing property at less than its fair value, is against public policy, and void (see *ante*, p. 92, § 2), yet persons may unite in any number that may be necessary to make the purchase advantageous to themselves, provided this junction of interests be without "dishonest motives," or injurious consequences. *James v. Fulcrood*, 5 Tex. 512. See, also, *Bellows v. Russell*, 20 N. H. 427; *Jenkins v.*

Frink, 30 Cal. 586; *Piatt v. Oliver*, 1 McLean (C. C.), 295; 2 id. 267. Among contracts and agreements which have been held not to be contrary to public policy, are the following: An agreement by the principal beneficiary under a will to pay money to the heirs on condition that they will not contest the will (*Palmer v. North*, 35 Barb. 282); an agreement between all the children of a family, that certain advancements made by their father to the sons when he was infirm in mind, should be set aside, and his whole property be divided among the children with an advantage to each son of a certain amount (*Fulton v. Smith*, 27 Ga. 413); a contract to pay one a consideration to induce him to administer upon the estates of the obligor's father and mother (*Clark v. Constantine*, 3 Bush [Ky.], 652); an agreement to pay for procuring a substitute, thereby to obtain an exoneration from an impending draft (*Proctor v. Frombelle*, 3 id. 672; *Fowler v. Donovan*, 79 Ill. 310); an agreement to pay a contingent compensation for professional services of a legitimate character, in prosecuting a claim against the United States pending in one of the executive departments (*Stanton v. Embrey*, 93 U. S. [3 Otto] 548); an absolute promise, upon a valuable consideration by one party, to bequeath or devise to another a certain and definite legacy or estate (*McGuire v. McGuire*, 11 Bush [Ky.], 142); contracts for the purchase and sale of gold (*Brown v. Speyers*, 20 Gratt. [Va.] 296; *Appleman v. Fisher*, 34 Md. 540); an agreement between one who has filed his bid for making a public improvement with another who is about to file his bid, to do the work in partnership in case the contract shall be awarded to either, the same to inure to the benefit of the firm, there being no intent to influence the bid of either party, nor to stifle fair competition (*Breslin v. Brown*, 24 Ohio St. 565; 15 Am. Rep. 627); a contract to forbear purchasing an interest in certain lands at private sale, and to assist another in the purchase thereof (*Morrison v. Darling*, 47 Vt. 67); an agreement to procure, by the proper use of proper means, a pardon from the governor, of a convict (*Formby v. Pryor*, 15 Ga. 258; *Bird v. Meadows*, 25 id. 251); and a contract under seal between two brothers, by which one of them agrees to convey to the other a certain tract of land expected to be devised to him by their father, when he shall have obtained possession of it. *Lewis v. Madisons*, 1 Munf. (Va.) 303.

So, it has been held that, before proceedings in bankruptcy have been commenced, a creditor may take from a third person a contract, covenant, or security for the payment of money, as an inducement to forbear instituting proceedings in bankruptcy against his debtor, without violating any provisions of the bankruptcy act, or contravening public policy. *Ecker v. Bohn*, 45 Md. 278. So, it was held that a

creditor who had received from his debtor a payment or preference, offensive to the provisions of the bankrupt law, and on which other creditors might institute proceedings under that law against the debtor, might lawfully contract with them for the forbearance of such proceedings. *Perryman v. Allen*, 50 Ala. 573.

Where a merchant is about to dispose of his entire stock in trade to another party, the buyer may contract with such merchant's clerk to make an invoice of the stock, the clerk, while making the invoice, still receiving his salary from his first employer. Such a contract is not void, as against public policy, and the service actually rendered to the buyer is sufficient consideration therefor. *Shattuck v. Nellis*, 44 Vt. 262.

So, after land is sold by the United States to an individual, and before the patent issues, a contract made with reference to the land or for the sale of it, is neither illegal nor in contravention of public policy, but is binding upon the parties making the contract. *Stone v. Young*, 5 Kans. 229.

So, an agreement may be made between a father and his child, by which, in consideration of moneys advanced by the father to the child, the latter may agree to make no claim to a share of his father's estate, should the latter die intestate, and thereby debar himself from such claim; and effect will be given to it in equity, according to the intention of the parties. *Havens v. Thompson*, 26 N. J. Eq. 383. And see *Gupton v. Gupton*, 47 Mo. 37.

A note made to the order of a town treasurer, in settlement of a fine and costs on a suit for selling liquor contrary to law, and given to a town officer in order to secure liberation, is not void as contrary to public policy. *Stonington v. Powers*, 37 Conn. 439. And a written promise to pay into the county treasury a certain sum of money, upon the condition that the county commissioners, who had removed the county court-house from the public square, and were building a new court-house elsewhere, would remove it back to said square, which offer is accepted by said commissioners, who enter on their records an order for such re-location, is held not to be void as against public policy, though the commissioners were not expressly authorized by statute to receive such donations. *Stilson v. Commissioners of Lawrence Co.*, 52 Ind. 213.

It was held, in New York, that moneys may lawfully be subscribed there, to be used in another country to aid it in a revolutionary struggle against a government at peace with the United States, if no violation of the neutrality law be committed. *Bailey v. Belmont*, 10 Abb. Pr. [N. S.] 270; S. C., 1 Jones & Sp. (N. Y.) 239.

That an agreement to pay a railroad company a certain sum of money, in consideration that the company will adopt a line along and near a public highway, instead of one already surveyed, is not contrary to public policy and will be enforced. See *Cedar Rapids, etc., R. R. Co. v. Spafford*, 41 Iowa, 292; *Botkin v. Livingston*, 16 Kans. 39. But see *contra*, *Holladay v. Patterson*, 5 Oreg. 177.

A contract between a railroad company and a telegraph company, by the terms of which each was to contribute, in certain respects, in establishing a telegraphic line along the railroad, and the telegraph company was to operate the line when completed, on specified terms, by which the railroad company agreed to give the telegraph company the exclusive right of way, for telegraphic purposes, so far as it legally might, and to discourage competition, is not contrary to public policy. *Western Union Tel. Co. v. Chicago, etc., R. R. Co.*, 86 Ill. 246.

§ 4. **Contracts to influence legislation.** A person may, without doubt, be employed to conduct an application to the legislature as well as to conduct a suit at law, and may contract for and receive pay for his services in preparing and presenting a petition or other documents, in collecting evidence, in making a statement or exposition of facts, or in preparing and making an oral or written argument, provided all these are used, or designed to be used, either before the legislature itself or some committee thereof, as a body. Such services, so rendered in procuring the passage of laws by the legislature, are legitimate everywhere, and may support a claim for compensation. *Sedgwick v. Stanton*, 14 N. Y. (4 Kern.) 289; *Willey v. Collier*, 7 Md. 273; *Bryan v. Reynolds*, 5 Wis. 200; *Weed v. Black*, 2 MacArthur, 268; *Russell v. Burton*, 66 Barb. 539; *Trist v. Child*, 21 Wall. 441. But courts of justice have, with jealous care, endeavored to protect every branch of the government from all illegitimate and sinister influences and agencies; and it has been settled by a series of decisions, uniform in their reason, spirit and tendency, that an agreement in respect to services as a *lobby* agent, or for the sale by an individual of his personal influence and solicitations, to procure the passage of a public or private law by the legislature, is void as being prejudicial to sound legislation, manifestly injurious to the interests of the State, and in express and unquestionable contravention of public policy. *Id.*; *Frost v. Belmont*, 6 Allen, 152; *Powers v. Skinner*, 34 Vt. 274; *Gil v. Davis*, 12 La. Ann. 219; *Usher v. McBratney*, 3 Dill. 385; *Wood v. McCann*, 6 Dana (Ky.), 366. Nor is it necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results. *Mills v. Mills*, 40 N. Y. (1 Hand)

543; *McKee v. Cheney*, 52 How. (N. Y.) 144. Any attempts to deceive persons intrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public. *Marshall v. Baltimore, etc., R. R. Co.*, 16 How. (U. S.) 314, 334.

It is, however, held in California, that any person may, without any violation of public policy, for hire, work for the passage of bills by the legislature, provided he does not conceal his interest in the matter, but lets it be known and understood by the members whose judgment he undertakes to influence. *Miles v. Thorne*, 38 Cal. 335.

§ 5. **Contracts to influence courts or judges.** Contracts to influence the action of courts or judges are clearly against public policy and void. See *ante*, pp. 79, 80, Art. 4. So, the power to create a judicial tribunal is one of the functions of the sovereign power. And, although parties may always make such tribunal for themselves, in any specific case, by a submission to arbitration, yet the power is guarded by the most cautious rules. And an agreement by which the members of an association undertake to confer judicial powers, in respect to the property in which they have a common interest, upon a body of men or officers, to be from time to time selected out of the association at large, as a tribunal having general authority to adjudicate upon alleged violations of the rules of the association, and to decree a forfeiture of the rights to such property, of the parties adjudged to have been guilty of such violation, is held to be contrary to public policy and void. *Austin v. Searing*, 16 N. Y. (2 Smith) 112.

§ 6. **Contracts to influence public officers.** A contract executed for the purpose of influencing an officer in the discharge of his duty, so as to benefit the party giving the obligation, is based upon an illegal consideration, and cannot be enforced. *Cook v. Shipman*, 51 Ill. 316. Personal solicitation of the president, the governor, or the heads of departments, for favors or for clemency, is not the lawful subject of contract. The apprehension that considerations, other than a high sense of duty and of the public interest, may thus be brought to influence their determination, forbids this employment. *Lyon v. Mitchell*, 36 N. Y. (9 Tiff.) 241.

An agreement to use a supposed influence with the street commissioner to induce him to allow certain claims is illegal, and a note given in consideration thereof is void. *Devlin v. Brady*, 32 Barb. 518; S. C. affirmed, 36 N. Y. (9 Tiff.) 531. So, an allowance to a public officer by a contractor or employee, however small, is such evidence of fraud as will invalidate the contract. *Lindsey v. City of Phila.*,

2 Phil. (Penn.) 212. A contract, the sole consideration for which is the forbearance of an officer to make an attachment on property exempt from attachment, is void. *Hennessey v. Hill*, 52 Ill. 281. So, an agreement by a third person to indemnify an officer for neglecting his duty in the service of a precept, being founded on an illegal consideration, is void. *Churchill v. Perkins*, 5 Mass. 541; *Hodsdon v. Wilkins*, 7 Me. 113. A promise to a jailer, by a prisoner, to pay for services and attention to his prisoner which the law made it his duty to perform, is not obligatory. But a promise to pay for extraordinary attention and services in his sickness, which the law did not make it the duty of the jailer to perform, is binding and not against public policy. *Trundle v. Riley*, 17 B. Monr. (Ky.) 396. A contract with a board of public officers, to pay them as individuals a certain sum for doing a certain act, is clearly illegal; but it is held that the contract may be made with them in their official capacity, for the benefit of the public interest which they have in hand. *Olineal v. Barry*, 24 Miss. 9.

An agreement to indemnify a sheriff for seizing certain property under an execution is valid, if the sheriff acts in good faith and with the sole object of enforcing a legal right; but if he commits a willful trespass, such agreement is avoided. *McCartney v. Shepard*, 21 Mo. 573; *Stark v. Raney*, 18 Cal. 622. A contract entered into to indemnify a sheriff for past neglect is not void for illegality. *Hall v. Huntoon*, 17 Vt. 244. And a contract to pay a given sum for making an application to the directors of a railroad company for the location of the depot on certain land, the money to be paid on location of the depot and the completion of the road, is not void as against public policy, unless it appear that sinister, extraneous, or corrupting influences are brought to bear upon the company to induce the location. And these must be affirmatively shown; they cannot be presumed. *Workman v. Campbell*, 46 Mo. 305. See *State v. Johnson*, 52 Ind. 197.

A promise to pay money to a mail contractor upon consideration that he will repudiate his contract for carrying the mail is void as contrary to public policy, even though the government holds security for the performance, and therefore will not be pecuniarily injured by the repudiation. *Weld v. Lancaster*, 56 Me. 453. And any agreement by which a candidate for office receives, from another person, money to aid him in securing his election, and in consideration thereof agrees to share with such other person a portion of the proceeds and emoluments of the office when elected, is immoral, against public policy and totally void. See *ante*, p. 92, § 2. And whether such a contract be executory or executed, no action can be brought, either on the

contract or to recover back the consideration, or to recover judgment on a promissory note made in consideration of a cancellation of such contract. *Martin v. Wade*, 37 Cal. 168.

But an engagement to pay an agent for services in negotiating a contract with the administrative agents of the government, such, for instance, as an army quartermaster, is not necessarily void. The vocation of agents so employed is in many cases peculiarly liable to abuse, and should, therefore, be narrowly watched, but it is not *necessarily* illegal or against public policy. *Winpenny v. French*, 18 Ohio St. 469. See *ante*, p. 99, § 4. And where an agent is employed to make a sale of property to the government, it is not unlawful to have reference to the fact that such agent is of the same political party with the administration, and has acquaintances and a reputation which would enable him to make an advantageous sale. *Lyon v. Mitchell*, 36 N. Y. (9 Tiff.) 235.

ARTICLE VII.

CONTRACTS IN RESTRAINT OF MARRIAGE.

Section 1. Definition and nature. Other contracts void upon grounds of public policy are those which are entered into in restraint of marriage. Marriage lies at the foundation, not only of individual happiness, but also of the prosperity, if not the very existence, of the social state; and the law, therefore, frowns upon and removes out of the way every rash and unreasonable restraint upon it, whether by way of penalty or inducement. See *Sterling v. Sinnickson*, 2 South. (N. J.) 756.

§ 2. **When such contracts void.** If by the terms of the contract one of the parties be restrained from marrying at all, or from marrying anybody, unless it be a particular person, and there be no corresponding obligation on that person, the contract is considered as injurious to the general interests of society, and therefore void. 1 Story's Eq. Jur., § 274; *Woodhouse v. Shepley*, 2 Atk. 535; *Cock v. Richards*, 10 Ves. 429; *Lowe v. Peers*, 4 Burr. 22, 25; *Phillips v. Medbury*, 7 Conn. 568; *Waters v. Tazewell*, 9 Md. 291; *Maddox v. Maddox*, 11 Gratt. (Va.) 804. As where an agreement was entered into between a man and a woman, by which he promised to pay her £1,000 if he married any person except herself. *Lowe v. Peers*, 4 Burr. 2225. And see *Baker v. White*, 2 Vern. 215. So, a wagering contract that the plaintiff would not marry within six years is *prima facie* in restraint of marriage, and is void at common law, unless it appear that

such restraint was prudent and proper in the particular instance. *Hartley v. Rice*, 10 East, 22. And a sealed bill promising to pay a sum of money, provided the obligee is not lawfully married within six months from the date, was held to be illegal and void. *Sterling v. Sinnickson*, 2 South. (N. J.) 756. It is likewise laid down as a general rule, that conditions annexed to gifts, legacies, and devises, in restraint of marriage generally, are against public policy, and will be held utterly void. So, if the condition is not in restraint of marriage generally, but the prohibition is of so rigid a nature, or so tied up to peculiar circumstances, that the party upon whom it is to operate is unreasonably restrained in the choice of marriage, it will be void. *Keily v. Monck*, 3 Ridw. P. C. 205, 244; *Morley v. Rennoldson*, 2 Hare, 570; 1 Story's Eq., § 280.

§ 3. **When such contracts valid.** Conditions annexed to gifts, etc., in restraint of marriage, are not, however, void if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the conditions are only such that marriage is not thereby absolutely prohibited, but only in part restrained, as in respect to time, place, or person, then such conditions are not utterly to be rejected. See 1 Story's Eq. Jur., § 282. Thus, a legacy given to a daughter, to be paid to her at twenty-one years of age, on condition that she do not marry before that time, is valid, since it postpones marriage only to a reasonable age of discretion. *Stackpole v. Beaumont*, 3 Ves. 96; *Beaumont v. Squire*, 17 Q. B. 905. A condition not to marry before twenty-eight years of age was likewise held to be good. *Younge v. Furse*, 8 DeG. M. & G. 756. And a condition that the party should not marry without the consent of parents or trustees, or other persons specified, is good. *Clarke v. Parker*, 19 Ves. 1; *Scott v. Tyler*, 2 Bro. C. C. 431; *Collier v. Slaughter*, 20 Ala. 263. A condition that the legatee shall not become a nun is valid. *In re Dickson*, 1 Eng. L. & Eq. 149. See, also, *Haughton v. Haughton*, 1 Molloy, 612; *Duggan v. Kelly*, 10 Ir. Eq. 295. So, a condition that a widow shall not marry is not unlawful, neither is an annuity during widowhood only. *Lloyd v. Lloyd*, 10 Eng. L. & Eq. 139; *Scott v. Tyler*, 2 Bro. Ch. 431, 488; *Newton v. Marsden*, 2 Johns. & H. 356; *Craven v. Brady*, L. R., 4 Eq. 209. But see *contra*, *Parsons v. Winslow*, 6 Mass. 169; *Hoopes v. Dundas*, 10 Penn. St. 75; *Stroud v. Bailey*, 3 Grant's (Penn.) Cas. 310. A condition that a child shall not marry until fifty years of age, or shall not marry any person inhabiting the same town, county, or State, or shall not marry any person except of a particular trade or employment, is void, for the reason that it operates as a virtual restraint of marriage

generally. *Scott v. Tyler*, 2 Dick, 712, 721, 722 ; S. C., 2 Bro. Ch. 431 , 488 ; 1 Story's Eq. Jur., § 283.

§ 4. **Who may interpose the defense.** See *ante*, pp. 68, 69, Art. 1, §§ 5, 6.

§ 5. **How interposed.** See *ante*, pp. 70, Art. 1, § 7.

§ 6. **Separation of husband and wife.** Contracts tending to facilitate the separation of husband and wife are likewise considered void, as being against the policy of the law. *Durant v. Titley*, 7 Price, 577 ; *Hindley v. Marquis of Westmeath*, 6 Barn. & C. 200, 212. Thus where a deed was made between the husband, wife and a trustee, providing a separate maintenance for the wife, and purporting to be made in contemplation of an *immediate* separation, but in fact, no separation then took place, nor was intended to take place at that time, the deed was held to be void. *Id.* But a deed *really* contemplating an immediate separation is valid upon the ground that, if a separation is decided upon and inevitable, such a deed serves to save the wife from destitution. *Id.* ; *Jee v. Thurlow*, 2 id. 547. So, when a separation between the husband and wife already exists, an agreement by the former to pay a sum of money to the latter during separation is valid, and may be enforced in equity. *Bucknell v. Bucknell*, 7 Ir. Ch. 130. And if a separation be inevitable and fully decided upon, a contract to furnish money to defray the expenses of procuring a divorce would be valid. *Moore v. Usher*, 7 Sim. 384. Such a contract does not tend to induce a separation, but merely provides means to effect an ultimate decision. *Id.*

Where the father gave a legacy to his daughter, "during her separation from her husband," she, at the time, living separate from him, but being reconciled and living with him at the father's death, the condition was held to be good, and that the legatee took nothing under the will, and a voluntary separation subsequent to the death of the testator would not entitle her to it. *Cooper v. Remsen*, 5 Johns. Ch. 459.

§ 7. **Marriage brokerage contracts.** Marriage brokerage contracts, by which a party engages to give another a compensation, if he will negotiate an advantageous marriage for him, are utterly void at common law (*Hall v. Potter*, 3 Lev. 411 ; *Smith v. Aykewell*, 3 Atk. 566 ; *Law v. Law*, 3 P. Wms. 391, 394), and no acts of the parties can make them valid in a court of equity. 1 Story's Eq. Jur., § 261 ; *Cole v. Gibson*, 1 Ves. 503. Such contracts have been called a sort of kidnapping into a state of conjugal servitude, and they ought in no case to be countenanced. *Drury v. Hooke*, 1 Vern. 412. It has been even held that a bond, given to the obligee as a remuneration for having assisted the obligor in an elopement and marriage without the consent

of friends, is void, although it is given voluntarily after the marriage, and without any previous agreement for the purpose. *Williamson v. Gihon*, 2 Sch. & Lefr. 356.

But it is said that these contracts are void, not because they are fraudulent upon either party, but because they are a fraud upon third persons, and are a public mischief, as they have a tendency to cause matrimony to be contracted on mistaken principles, and without the advice of friends, and they are relieved against as a general mischief, for the sake of the public. *Boynton v. Hubbard*, 7 Mass. 112; *Crawford v. Russell*, 62 Barb. 92. And see 1 Story's Eq. Jur., § 261.

ARTICLE VIII.

CONTRACTS IN RESTRAINT OF TRADE.

Section 1. Definition and nature. The rule applicable to contracts in restraint of trade are: *First*, to be valid, the restraint must be partial only; *Second*, it must be founded upon a valuable consideration; and, *Third*, it must be reasonable, and not oppressive. *Grasselli v. Lowden*, 11 Ohio St. 349; *Holmes v. Martin*, 10 Ga. 503. An agreement in *general* or *total* restraint of trade is illegal and void. *Id.* Thus, an agreement not to carry on a certain business *anywhere* is invalid, whether it be by parol or specialty, or whether it be for a limited or for an unlimited time (*Mitchel v. Reynolds*, 1 P. Wms. 181; *Gale v. Reed*, 8 East, 80; *Hitchcock v. Coker*, 6 Ad. & El. 438; *Hinde v. Gray*, 1 Man. & Gr. 195; *Alger v. Thacher*, 19 Pick. 51; *Keeler v. Taylor*, 53 Penn. St. 468; *Lange v. Werk*, 2 Ohio St. 519; 1 Story on Cont., § 679), and upon whatsoever consideration it may be made. *Ho-mer v. Ashford*, 3 Bing. 323; *Chappel v. Brockway*, 21 Wend. 157. There are two principal grounds on which the doctrine is founded, that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family. *Mitchel v. Reynolds*, 1 P. Wms. 181; *Morris v. Colman*, 18 Ves. 436; *Lawrence v. Kidder*, 10 Barb. 641, 653; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. (U. S.) 64. It is evident that both these evils occur when the contract is *general*, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases, and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it; and a contract that is open to such grave objection is clearly against public policy. See *id.*

§ 2. **Contract, when valid.** At an early period in English jurisprudence, when trade and the mechanic arts were in their infancy, it was deemed a matter of the greatest public importance to encourage their growth, and to prohibit contracts which tended to abridge them. Hence the rule first established was, that all contracts were void which in any degree tended to the restraint of trade, even in a particular, circumscribed locality, either for a definite, or for an unlimited period. In the first reported case on the subject (Year Book, 2 Henry 5), the judges became indignant, and threatened to send the plaintiff to prison; and for a long time contracts of this character were treated with the greatest severity. See 1 Sm. Lead. Cas. 516; *Wright v. Ryder*, 36 Cal. 342. But as population and trade increased, and there was consequently a greater competition in all useful pursuits, the necessity for the stringent rule which before prevailed had in a greater measure ceased, and the rule itself was greatly relaxed and modified. Instead of denouncing as void all contracts in restraint of trade, the rule, as relaxed, tolerated such as were restricted in their operations within reasonable limits. And it is now the well-settled doctrine, according to both the English and the American decisions, that while a contract by an artisan not to follow his calling at any time or place is an unreasonable restraint upon trade, contrary to public policy, and therefore void, nevertheless, if he contracts for a valuable consideration not to pursue his occupation within certain reasonable, restricted limits, the contract is valid and will be enforced. *Id.*; *Mott v. Mott*, 11 Barb. 128; *Duffy v. Shockey*, 11 Ind. 71; *Jenkins v. Temples*, 39 Ga. 655; *Hoagland v. Segur*, 38 N. J. Law, 230, and cases cited *ante*, p. 105, § 1. In like manner, a stipulation by the vendor of an article to be used in a business or trade in which he is himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with his said business or trade, is also valid and binding. *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. (U. S.) 64; *Hubbard v. Miller*, 27 Mich. 15; S. C., 15 Am. Rep. 153. The point of difficulty in these cases lies in determining what are reasonable and what unreasonable restrictions, in respect to the area within which the restriction is to be confined. It is clear, at first view, that this must depend upon the circumstances of the particular case (*Ward v. Byrne*, 5 Mees. & W. 548); although, from the uncertain character of the subject, much latitude must be allowed to the judgment and discretion of the parties. See *Caswell v. Gibbs*, 33 Mich. 331. Thus much is, however, well settled, namely, that a stipulation that another shall not pursue his trade or employment at such a distance from the business of the person protected as that it could not possibly affect or injure

him, would be unreasonable and absurd. On the other hand, a stipulation is unobjectionable and binding which imposes the restraint to only such an extent of territory as may be necessary for the protection of the party making the stipulation, provided it does not violate the two indispensable conditions, that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefit of his exertions. *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. (U. S.) 64.

§ 3. **When valid to a limited extent.** A contract, by which a physician agrees not to practice his profession, in a particular town and the vicinity thereof (*Warfield v. Booth*, 33 Md. 63), or not within twelve miles of a certain town (*McClurg's Appeal*, 58 Penn. St. 51), is not obnoxious to objection on the ground of public policy. Id.; *Butler v. Burleson*, 16 Vt. 176. See, also, *Gilman v. Dwight*, 13 Gray, 356; *Hoyt v. Holly*, 39 Conn. 326; S. C., 12 Am. Rep. 390. And the sale of the practice and good-will of a physician, within reasonable limits, carries with it the implied covenant, as in other sales, that the seller will not himself do any thing to disturb or injure the buyer in the enjoyment of that which he has purchased. *Dwight v. Hamilton*, 113 Mass. 175. See, also, *Austen v. Boys*, 2 DeG. & J. 626. An agreement, founded on a reasonable consideration, not to carry on a trade in a particular place (*Taylor v. Blanchard*, 13 Allen, 370; *Ellis v. Jones*, 56 Ga. 504), and for a particular time (*Nobles v. Bates*, 7 Cow. 307), is likewise valid and binding. Id.; *Pike v. Thomas*, 4 Bibb (Ky.), 486; *Palmer v. Stebbins*, 3 Pick. 188. Thus, a bond not to engage in the business of iron casting within sixty miles of Calais, said area containing but few places of much business, was held to be valid. *Whitney v. Slayton*, 40 Me. 224. So, a contract by the vendor of a butcher's stall not to sell, or cause to be sold, any meat of a particular kind within the city during two years, is valid. *Verges v. Forshee*, 9 La. Ann. 294. The following contracts have likewise been held not to be in restraint of trade, and consequently to be valid. A contract entered into upon sufficient consideration between A and B, that A shall not sell furniture in Ottawa to any person except B (*Roller v. Ott*, 14 Kans. 609); a contract to furnish a party with sewing machines at a discount, and upon a credit, which provides that such party shall deal exclusively in the machine sold by the party agreeing to furnish, and purchase the same of him exclusively (*Brown v. Rounsavell*, 78 Ill. 589); an agreement to give up keeping a tavern at a place half a mile from the plaintiff, on the same road (*Heichew v. Hamilton*, 3 Iowa, 596); a contract to sell the secret of making a certain medicine, and binding the vendor not to disclose the secret to any person than

the vendee, and not to use it himself (*Hard v. Seeley*, 47 Barb. 428. See, also, *Jarvis v. Peck*, 10 Paige, 118); an agreement between two persons for the manufacture and sale of a certain patented article, which provides for the continuance of the manufacture by one of them, and that the other after a certain time shall abstain therefrom (*Kinsman v. Parkhurst*, 18 How. [U. S.] 289. See, also, *Morse Twist, etc., Co. v. Morse*, 103 Mass. 73; 4 Am. Rep. 513; *Billings v. Ames*, 32 Mo. 265); the sale of a steamboat under an express agreement that it should not be run on a certain river beyond a given point (*Dunlop v. Gregory*, 10 N. Y. [6 Seld.] 241); an agreement not to manufacture a particular article (*Gillis v. Hall*, 2 Brewst. [Penn.] 342); an agreement not to run a stage coach between Providence and Boston, in opposition to the plaintiff's stage coach (*Pierce v. Fuller*, 8 Mass. 223); an agreement not to be interested in any voyage to the north-west coast of America, or in any traffic with the natives of that coast, for seven years (*Perkins v. Lyman*, 9 id. 522); and where a dentist agreed to purchase artificial teeth of a manufacturer on condition that the latter would not sell such teeth to any other person in the town where the dentist resided, the condition was held to be valid, being only in partial restraint of trade. *Clark v. Crosby*, 37 Vt. 188.

One may be liable for a breach of covenant not to be interested in a certain business, as, for instance, the manufacture of daguerreotype materials, within a certain precinct, although a covenant in the same indenture not to be interested for five years in the same business *within the United States* may be void as in restraint of trade. *Dean v. Emerson*, 102 Mass. 480. And a contract not to engage in a particular trade for a specified time, "in the city of St. Louis, or at *any other place*," is divisible, and, as to the restriction imposed in St. Louis, is not void as in restraint of trade. *Peltz v. Eichele*, 62 Mo. 171.

An agreement made upon the dissolution of a copartnership and a purchase by one of the firm of the stock in trade, that the retiring partner shall not engage in the business for a specified period of time, or so long as the other shall continue such business, is not in restraint of trade, and is valid. *Curtis v. Gokey*, 68 N. Y. (23 Sick.) 300.

§ 4. **When void.** The law will not presume an agreement void as illegal or against public policy, when it is capable of a construction which will make it valid. *Curtis v. Gokey*, 68 N. Y. (23 Sick.) 300. But the provisions of a contract entered into, even in partial restraint of trade, should not be extended by construction or implication so as to favor persons desiring to enforce them, beyond what their terms would most clearly require. *Roller v. Ott*, 14 Kans. 609. A bond conditioned that the obligor shall never carry on, or be concerned in, the business of

founding iron, is void (*Alger v. Thacher*, 19 Pick. 51); so of a contract made between citizens of a State, by which one of them agrees "not to set up, exercise, or carry on the trade or business of manufacturing shoe-cutters" *within the State*. *Taylor v. Blanchard*, 13 Allen, 370. See, also, *Lawrence v. Kidder*, 10 Barb. 649. So of a covenant by the vendor of marl land, that neither he nor his assigns will sell marl from the adjoining land (*Brewer v. Marshall*, 19 N. J. Eq. 537); and a contract between the lessor and lessee of a coal mine that the lessee should not give or accept any order for goods and merchandise on any other store than the lessor's, was held to be unlawful, as in restraint of trade, and tending to extortion. *Crawford v. Wick*, 18 Ohio St. 190. If the purchaser of a steamboat, at the time of the purchase, covenants with the seller that he will not run or employ, or suffer to run or be employed, the said boat for ten years upon any of the routes of travel of the waters of a State, the covenant, being in restraint of trade and commerce, is held to be void, as against public policy. *Wright v. Ryder*, 36 Cal. 342. But see *contra*, *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. (U. S.) 64. So, a contract by which one of the parties binds himself not to engage in a particular business or occupation "in the city and county of San Francisco, or State of California," is in restraint of trade, and therefore void, as against public policy. *More v. Bonnet*, 40 Cal. 251; S. C., 6 Am. Rep. 621. Such a contract, being entire, cannot be severed so as to enforce that portion relating to the city and county of San Francisco, rejecting that relating to the State of California. *Id.* But see *ante*, § 3, p. 107.

A covenant by the lessor of a brewery that he will not, during the continuance of the demise, carry on the business of a brewer or merchant, or agent for the sale of ale, etc., in S. and elsewhere, or in any other manner whatsoever be concerned in the said business, is void, as being a general restraint of trade. *Hinde v. Gray*, 1 Scott (N. R.), 123; S. C., 1 Man. & Gr. 195. And a contract entered into by the grain dealers of a town, which, on its face, indicates that they have formed a partnership for the purpose of dealing in grain, but the true object of which is to form a secret combination, which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, costs of storage, and expense of shipment at such town, is in restraint of trade, and consequently void on the ground of public policy. *Craft v. McConoughy*, 79 Ill. 346; S. C., 22 Am. Rep. 171. So, an agreement entered into by several commercial firms, by which they bound themselves for the term of three months, not to sell any India cotton bagging, except with the consent of the majority of them, was held to be a combination to enhance the

price of the article, which was in restraint of trade and contrary to public order, and that the agreement could not be enforced in a court of justice. *India Association v. Kock*, 14 La. Ann. 168. So of a combination to control the sale of coal and the price. *Arnott v. Pittston, etc., Canal Co.*, 68 N. Y. (23 Sick.) 558; 23 Am. Rep. 190; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173; 8 Am. Rep. 159. But where A leased a portion of a warehouse, in the city of M., to B, for a specified term, for the storage of wheat, and covenanted that during the term he would not purchase, store or handle any wheat in the market of M., except under the direction of B, it was held that this covenant was not an unreasonable restraint upon trade, and did not so contravene public policy as to be void. *Kellogg v. Larkin*, 3 Chand. (Wis.) 133.

So, it seems that the general rule that contracts made in restraint of trade are void at common law, would not vitiate a contract in restraint of trade, entered into at a time when it was the policy of the law to impose restrictions upon commerce; and, consequently, that an embargo bond, made while the embargo laws were in force, would be binding as a common-law bond. *Dixon v. United States*, 1 Brock. (C. C.) 177.

Any deed by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking *in the kingdom*, would be void in England. *Homer v. Ashford*, 3 Bing. 328. And if the restraint be *general*, and not confined to any particular locality, the shortness of the time for which it is imposed will not make it good. *Ward v. Byrne*, 5 Mees. & W. 548. When a perfumer sold to his copartner his share of the business of the firm, and covenanted not to carry on the same business in the cities of London and Westminster, or within six hundred miles from those cities, the court of exchequer held the covenant to be valid as to the restraint of the practice in London and Westminster, but void as to the residue. *Green v. Price*, 13 Mees. & W. 695; S. C. affirmed, 16 id. 346. So, a covenant by a surgeon not to practice or reside, at any time, within two and a half miles of the plaintiff's residence in London, was held to be valid, and it was declared to be no objection to it that it imposed the restriction during the life of the covenantor. *Atkyns v. Kinnier*, 4 Exch. 776.

In computing the distance the mode is to adopt a straight line "as the crow flies," and not by measuring the nearest mode of practicable access. *Mouflet v. Cole*, L. R., 8 Exch. 32; 4 Eng. Rep. 429; affirming S. C., L. R., 7 Exch. 70; 1 Eng. Rep. 177.

§ 5. **Of the consideration.** A contract in restraint of any trade or business, though it be under seal, requires a sufficient consideration,

which must be either apparent on the face of the deed or exist in fact, or, if contested, be established by proof. See *ante*, p. 105, § 1. *Hutton v. Parker*, 7 Dowl. (P. C.) 439; *Ross v. Sadgbeer*, 21 Wend. 166; *Weller v. Hersee*, 10 Hun (N. Y.), 431. It is not necessary, however, that the consideration should be *adequate*, in point of fact. If the contract shows on its face a legal and valuable consideration, it may be sustained notwithstanding objection to it as being inadequate. *Guerand v. Dandeleit*, 32 Md. 561; S. C., 3 Am. Rep. 164. And see *Homer v. Ashford*, 3 Bing. 322; *Hitchcock v. Coker*, 6 Ad. & El. 439; *Pilkington v. Scott*, 15 Mees. & W. 657. A consideration which would be legally sufficient to support a simple contract, will be ordinarily sufficient to support an agreement for a particular and partial restraint of trade. 1 Story on Cont., § 680; *Lawrence v. Kidder*, 10 Barb. 649; *Duffy v. Shockey*, 11 Ind. 70. And see *Tallis v. Tullis*, 1 El. & Bl. 391, 397, n. Thus, the consideration of one dollar is, in law, a valuable consideration, and was held to be sufficient to support a contract not to run a stage-coach in opposition to the plaintiff. *Pierce v. Fuller*, 8 Mass. 223. And where the defendant, in consideration of ten shillings, promised the plaintiff to pay him a hundred pounds, if thenceforward he kept any draper's shop in Newgate market, the contract was adjudged good and the plaintiff had judgment. *Bragg v. Tanner*, cited in *Broad v. Jollyfe*, Cro. Jac. 597. And see *Palmer v. Stebbins*, 3 Pick. 188.

§ 6. **As to its reasonableness.** A contract in restraint of trade, in order to be valid, must not only be partial and founded upon a valuable consideration, but it must also be *reasonable*. See *ante*, p. 105, § 1. As to the test of reasonableness see *ante*, p. 106, § 2. Whether a restriction of trade is or is not reasonable, is held to be a question of law for the court, and not of fact for the jury. And the tendency in the courts has been to construe all restrictions liberally, and not strictly. See *Mallan v. May*, 11 Mees. & W. 653; *Proctor v. Sargent*, 2 Man. & Gr. 20; 1 Story on Cont., § 683. But see *Roller v. Ott*, 14 Kans. 609; *Lawrence v. Kidder*, 10 Barb. 650. In the case last cited the whole doctrine on the subject, as summed up by SELDEN, J., is, "that the law will tolerate no contract which, upon its face, goes to prevent an individual for any time, however short, from rendering his services to the public in any employment to which he may choose to devote himself; nor one which deprives any section of the country, however small, of the chances that the obligor in such contract may furnish to it the accommodation arising from the prosecution of a particular trade, unless it appear that the obligee himself intends to and can supply such accommodation." See *Chappel v. Brockway*, 21

Wend. 157. The burden of showing that a contract in restraint of trade is valid and reasonable, and founded on a good consideration, rests upon the party seeking to enforce it. The law starts with the presumption that the contract is void, and it is only by showing that there was an adequate consideration or good reason for entering into it that the presumption can be destroyed. The rule is, not that a limited restraint is good, but that it *may* be good. *Ross v. Sadgbeer*, 21 Wend. 166; *Weller v. Hersee*, 10 Hun (N. Y.), 431. It is valid where the restraint is reasonable, and the restraint is reasonable when it imposes no shackles upon one party which are not beneficial to the other. *Id.*

The question as to what extent of territory is included in the name of a place, is held to be a question for a jury, and the uncertainty cannot be taken advantage of on demurrer. *Blanding v. Sargent*, 33 N. H. 239; 1 Sm. Lead. Cas. (7th Am. ed.) 727.

ARTICLE IX.

OF STOCK-JOBGING.

Section 1. Stock-jobbing is a business transacted on the exchange, by persons known as "jobbers," who, while dealing for themselves, at the same time make purchases and sales for their customers, chiefly by means of what are called "time-bargains." See *Grissell v. Bristowe*, L. R., 4 C. P. 36; *Coles v. Bristowe*, L. R., 4 Ch. App. 3. And time-bargains made in good faith, for the future delivery of any commodity, as grain for instance, are held to be valid at common law. *Wolcott v. Heath*, 78 Ill. 433; *Brua's Appeal*, 55 Penn. St. 294; *Noyes v. Spaulding*, 27 Vt. 420; *Brown v. Hall*, 5 Lans. (N. Y.) 180; *Hibblewhite v. McMorine*, 5 Mees. & W. 462; *Kingsbury v. Kirwin*, 11 J. & Sp. 451. And see *ante*, p. 86, art. 5, § 3. Mercantile contracts of this character are frequently entered into, and they are consistent with a *bona fide* intention on the part of both parties to perform them. The vendor of goods may expect to produce or acquire them in time for a future delivery, and while wishing to make a market for them, is unwilling to enter into an absolute obligation to deliver, and, therefore, bargains for an option which, while it relieves him from liability, assures him of a sale, in case he is able to deliver. And the purchaser may, in the same way, guard himself against loss beyond the consideration paid for the option, in case of his inability to take the goods. *Id.*; *Disborough v. Neilson*, 3 Johns. Cas. 81. There is no inherent vice in such a contract. *Id.* And gold and silver coin may be the subject of such a

contract, like any other commodity. *Brown v. Speyers*, 20 Gratt. (Va.) 296; *Peabody v. Speyers*, 56 N. Y. (11 Sick.) 230.

§ 2. **Contracts when void.** Contracts of the character above described may, however, be mere disguises for gambling. The form of a contract of sale may be resorted to as a mere cover for betting on the future price of the commodity agreed to be sold, and if this is the real meaning of the transaction, and no actual sale or purchase is intended, the contract is illegal, and will not be enforced. *Ante*, p. 84, Art. 5, § 2. Thus, where a contract is made for the delivery or acceptance of stock at a future day, at a price named, and neither party at the time of making the contract *intends* to deliver or accept the shares, but merely to pay the differences according to the rise and fall of the market, the contract is held to be a mere wager, and void. *Maxton v. Gheen*, 75 Penn. St. 166; *Yerkes v. Solomon*, 11 Hun (N. Y.), 471; *Cameron v. Durkheim*, 55 N. Y. (10 Sick.) 425. So, it is held that "puts," or the privilege for a nominal consideration of delivering a large quantity within a certain time at a specified price, when taken by persons who are known to be endeavoring to effect what is technically called a "corner" in the grain market, are wager contracts, and void as against public policy. *Ex parte Young*, 6 Biss. (C. C.) 53.

A contract for the sale of wheat in store, to be delivered at a future time, which requires the parties to put up margins as security, and provides that if either party fails, on notice, to put up further margins according to the market price, the other may treat the contract as filled immediately, and recover the difference between the contract and the market price, without offering to perform on his part, or showing an ability to perform, is illegal and void. *Lyon v. Culbertson*, 83 Ill. 34.

The frequent fluctuations in the value of gold, the opportunities for combinations to affect the market, the ability to ascertain its market value on any day or hour of the day, make time-sales of gold a means often resorted to for speculation and gambling. There may, therefore, be a suspicion when a time-contract to sell gold, optional on one side, is shown, that it was made as a wager or bet upon the price of gold when the contract matures. But the facts that it was a contract for the sale of gold, and that it was optional on the part of the seller, are not alone sufficient to establish the illegal intention, or authorize the inference that the contract was a wager. *Bigelow v. Benedict*, 9 Hun (N. Y.), 429; S. C. affirmed, 70 N. Y. (25 Sick.) 202.

ARTICLE X.

OF SUNDAY LAWS.

Section 1. Definition and nature. Sunday, or the first day of the week, begins in some of the New England States at sunset on Saturday, and ends at the same time the next day. 2 Bouv. Dict. 559. See *Finn v. Donahue*, 35 Conn. 216. In other parts of the United States it generally commences at twelve o'clock on the night between Saturday and Sunday, and ends in twenty-four hours thereafter. *Id.*; *Huidekoper v. Cotton*, 3 Watts (Penn.), 56, 59; *Kilgour v. Miles*, 6 Gill & J. (Md.) 268. The *Sabbath*, the *Lord's day*, and *Sunday*, all mean the same thing. *Id.*

By the common law, no distinction was made, in respect to the making of contracts, between Sunday and any other day. *Drury v. De-fontaine*, 1 Taunt. 135; *Kepner v. Keefer*, 6 Watts, 231; *Fox v. Mensch*, 3 Watts & Serg. 444; *Bloom v. Richards*, 2 Ohio St. 387; *Horacek v. Keebler*, 5 Neb. 355. It has been even said, that no case could be found holding a contract to be void at common law because executed on a Sunday. REDFIELD, J., in *Adams v. Gay*, 19 Vt. 365. But see *contra*, *Morgan v. Richards*, 1 Browne (Penn.), 173; and, in England, and pretty generally in this country, more or less stringent laws have been enacted, by which all ordinary labor and *business* are forbidden under fixed penalties.

§ 2. **What contracts void.** Contracts founded on an act prohibited by statute, under a penalty, are void. See *ante*, p. 64, Art. 1, § 1. Under this rule all contracts made in violation of the statute 27 Car. 2 c. 7, § 1, forbidding persons from exercising any "worldly labor, business or work of their ordinary callings, upon the Lord's day, or any part thereof (works of necessity and charity alone excepted)," are void. *Fennell v. Ridler*, 5 Barn. & C. 406. And so of contracts made in violation of similar statutes in this country. See *Allen v. Gardiner*, 7 R. I. 22; *Hazard v. Day*, 14 Allen, 487; *Tucker v. West*, 29 Ark. 386. The ground upon which the courts have refused to sustain actions on contracts made in contravention of statutes for the observance of the Lord's day, is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction. *Cranston v. Goss*, 107 Mass. 439; S. C., 9 Am. Rep. 45. It is upon this principle that a bond, promissory note or other *executory contract*, made and delivered upon the Lord's day, is incapable of being enforced, or, as is sometimes said, is absolutely void

as between the parties. *Day v. McAllister*, 15 Gray, 433; *Allen v. Deming*, 14 N. H. 133; *Finn v. Donahue*, 35 Conn. 216; *Pope v. Linn*, 50 Me. 83. A promise to repay money borrowed on the Lord's day, whether in writing, verbal or implied, cannot be enforced. *Meader v. White*, 66 Me. 90; S. C., 22 Am. Rep. 551. Upon the same principle, if the contract has been *executed* by the illegal act of both parties on the Lord's day, the law will not assist either to avoid the effect of his own unlawful act. Thus, if the amount of a pre-existing debt has been paid and received on Sunday, the law will neither assist the debtor to recover back the money, nor the creditor, while retaining the amount so paid, to treat the payment as a nullity and enforce payment over again. *Johnson v. Willis*, 7 Gray, 164. If a chattel has been delivered by the owner to another person, on the Lord's day, by way of bailment or pledge, the latter may retain it for the special purpose for which he received it; or, if it has been delivered to him on the Lord's day by way of sale or exchange, it cannot, at least if he has at the same time paid or delivered the consideration on his part, be recovered back at all. *Myers v. Meinrath*, 101 Mass. 366; S. C., 3 Am. Rep. 368; *Greene v. Godfrey*, 44 Me. 25. The rule, as stated by the court in Massachusetts, is— if a chattel has been sold and delivered on the Lord's day without payment of the price, the seller cannot recover either the price or the value; not the price agreed on that day, because the agreement is illegal; not the value, because whether the property is deemed to have passed to the defendant, or to be held by him without right, there is no ground upon which a promise to pay for it can be implied. *Ladd v. Rogers*, 11 Allen, 209; *Cranston v. Goss*, 107 Mass. 439; S. C., 9 Am. Rep. 45. See, also, *Simpson v. Nicholls*, 3 Mees. & W. 240. So, it is held that where a deed to land is made on Sunday, and the money paid (possession of the land having been previously given to the vendee), the law will leave the parties where it finds them. Both being *in pari delicto*, although the contract consummated on Sunday be illegal, the courts will not interfere. *Ellis v. Hammond*, 57 Ga. 179. And a contract which could not be lawfully made on Sunday, cannot, if lawfully made, be rescinded on that day. *Benedict v. Bachelder*, 24 Mich. 425; S. C., 9 Am. Rep. 130.

It follows from the doctrine above stated, that, as between the parties to a contract made in violation of the Lord's day, it is incapable of being confirmed or ratified; for in suing upon the original contract after its ratification by the defendant, it would still be necessary for the plaintiff, in proving his case, to show his own illegal act in making the contract at first. *Day v. McAllister*, 15 Gray, 433; *Bradley v. Rea*,

14 Allen, 20; S. C. affirmed, 103 Mass. 188; 4 Am. Rep. 534; *Pope v. Linn*, 50 Me. 83; *Boutelle v. Melendy*, 19 N. H. 196. It is, however, held in Vermont, that contracts made on Sunday, if affirmed on a subsequent day, become valid. *Blood v. Bates*, 31 Vt. 147. And where a horse was sold on Sunday, and a note was given therefor upon the same day, it was held that the subsequent retention of the horse without an offer to return, and payments upon the note, were an affirmation and ratification of the note. *Sumner v. Jones*, 24 id. 317. And see *Harrison v. Colton*, 31 Iowa, 16; *King v. Fleming*, 72 Ill. 21; S. C., 22 Am. Rep. 131.

Where the statute merely prohibits any one from the exercise of business or work of his *ordinary calling*, one party cannot sue upon a contract made by him on the Lord's day in the exercise of his ordinary calling, even if it is not within the ordinary calling of the other, and the parties met on that day at the request of the latter. *Hazard v. Day*, 14 Allen, 487. But upon a contract made on the Lord's day in the exercise of the ordinary calling of one party, the other may sue, if it was not within his own ordinary calling, and he did not know, when he entered into it, that it was within the ordinary calling of the defendant. *Bloxsome v. Williams*, 3 Barn. & C. 232; S. C., 5 Dowl. & Ry. 82; 1 Carr. & P. 294. The true construction of the words "ordinary calling," seems to be, not that without which a trade or business cannot be carried on, but that which the ordinary duties of the calling bring into continued action. Those things which are repeated daily or weekly in the course of trade or business are parts of the ordinary calling of a man exercising such trade or business; as, for instance, a contract by a livery-stable keeper to let a horse on Sunday, for the purposes of business or pleasure, is void, as being within his ordinary calling. *Whelden v. Chappel*, 8 R. I. 230; *Tillock v. Webb*, 56 Me. 100; *Stewart v. Davis*, 31 Ark. 518; 25 Am. Rep. 576. But a contract for a year, made on a Sunday between a farmer and a laborer, is not within the statute, and is valid. *Rex v. Whitnash*, 7 Barn. & C. 596; S. C., 1 M. & R. 452. So, it is held that an attorney, who, acting on behalf of his client, agrees to become personally responsible for part of the debt owing by him, does not thereby do any work of his "ordinary calling" within the meaning of the statute. *Peate v. Dickens*, 5 Tyr. 116; S. C., 1 Cr., M. & R. 422; 3 Dowl. P. C. 171. And where a person sent a mare to a farmer, to be covered by a stallion belonging to him, and the mare was taken to his stables, and covered accordingly, upon a Sunday, it was held that the contract was not void, on the ground of its having been made and executed on a Sunday, it not being made by

the farmer in the exercise of his ordinary calling. *Scarfe v. Morgan*, 4 Mees. & W. 270.

It has been repeatedly held, that no action can be maintained on a warranty made on the sale or exchange of horses on Sunday (*Finley v. Quirk*, 9 Minn. 194; *Murphy v. Simpson*, 14 B. Monr. [Ky.] 337; *Bradley v. Rea*, 14 Allen, 20; *Lyon v. Strong*, 6 Vt. 219); nor for a deceit practiced in the exchange of horses on that day. *Robeson v. French*, 12 Metc. 24. A contract of insurance made on Sunday, and not subsequently ratified, is void. *Heller v. Crawford*, 37 Ind. 279. And, in general, a contract made on Sunday is void, unless the case falls within some of the exceptions of the statute, the burden of showing which is on the party claiming it (*Sayre v. Wheeler*, 32 Iowa, 559); and in the absence of proof, it will be presumed that the laws of another State, where the contract was executed, are, in this respect, the same as those of the State where the action upon the contract is brought. *Id.* But in order to render a contract void, for the reason that it was closed on Sunday, it must appear that the party seeking to enforce it had some voluntary agency in consummating the contract on that day. *Sergeant v. Butts*, 21 Vt. 99.

Whether the contract was made on Sunday or on a week day is a question for the jury. *Bradley v. Rea*, 103 Mass. 188; 4 Am. Rep. 524.

It was held in a Massachusetts case, that the owner of a horse, who knowingly lets him on the Lord's day, to be driven to a particular place, but not for any purpose of necessity or charity, cannot maintain an action against the hirer for an injury done to the horse by his immoderate driving, in consequence of which the horse afterward dies, although the injury is occasioned in going to a different place and beyond the limits specified in the contract. *Gregg v. Wyman*, 4 Cush. 322. And the correctness of this doctrine was maintained in *Whelden v. Chappel*, 8 R. I. 230, and affirmed in the more recent case of *Smith v. Rollins*, 11 id. 464; S. C., 23 Am. Rep. 509. The doctrine was, however, denied in *Woodman v. Hubbard*, 25 N. H. 67; and in *Morton v. Gloster*, 46 Me. 520; *Parker v. Latner*, 60 id. 528; 11 Am. Rep. 210, 212, note. And in the recent case of *Hall v. Corcoran*, 107 Mass. 251; S. C., 9 Am. Rep. 30, the decision in *Gregg v. Wyman*, 4 Cush. 322, is directly overruled, and the law of Massachusetts on the subject is now in substantial harmony with that of Maine and New Hampshire, namely, that the owner of a horse, who lets it on the Lord's day to be driven for pleasure to a particular place, can maintain an action of tort against the hirer for driving it to a different place, and, in doing so, injuring it. *Hall v. Corcoran*, 107 Mass. 251;

S. C., 9 Am. Rep. 30. The law of Connecticut is the same (*Frost v. Plumb*, 40 Conn. 111; S. C., 16 Am. Rep. 18), and the rule as stated by CARPENTER, J., is, "that the plaintiff cannot recover whenever it is necessary for him to prove, *as a part of his cause of action*, his own illegal contract, or other illegal transactions; but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear, and may be important even as explanatory of other facts in the case, he may recover. It is sufficient if his cause of action is not essentially founded upon something which is illegal. If it is, whatever may be the form of the action, he cannot recover." *Id.*

In New York, traveling on Sundays, except for special purposes, being prohibited by statute, a contract for the hiring of horses and a carriage, made with the knowledge that they are to be used for the purpose of riding on Sunday to a place of resort for pleasure, is illegal, and the owner cannot recover compensation for the use of property so hired. But if the hirer willfully injures the property, or suffers it to be injured through his negligence, the owner may recover the damages he has sustained. *Nodine v. Doherty*, 46 Barb. 59. See, also, *Merritt v. Earle*, 29 N. Y. (2 Tiff.) 115; *Carroll v. Staten Island R. R. Co.*, 58 N. Y. (13 Sick.) 126; S. C., 17 Am. Rep. 221; *Bertholf v. O'Reilly*, 8 Hun (N. Y.), 16; S. C. affirmed, 18 Alb. L. J. 388. The rule is the same in Arkansas. *Stewart v. Davis*, 31 Ark. 518; S. C., 25 Am. Rep. 576. It was, however, held in a recent case in Maine, that an action on the case for injuries to the plaintiff's horse, by reason of the defendant's neglect and careless driving during a pleasure drive on Sunday, for which he was hired, is not maintainable. *Parker v. Latner*, 60 Me. 528; S. C., 11 Am. Rep. 210.

§ 3. **What contracts valid.** A promissory note, bearing the date of a secular day, is valid in the hands of a *bona fide* holder for value, although, in fact, made and delivered on the Lord's day, and, therefore invalid as between the original parties. *Cranston v. Goss*, 107 Mass. 439; S. C., 9 Am. Rep. 45. See, also, *Begbie v. Levi*, 1 Cr. & Jerv. 180; *Saltmarsh v. Tuthill*, 13 Ala. 390; *Vinton v. Peck*, 14 Mich. 287; *State Capital Bank v. Thompson*, 42 N. H. 369; *Bank of Cumberland v. Mayberry*, 48 Me. 198. In such case the maker of the note is estopped as against a *bona fide* holder for value, to show that it was made on Sunday. *Knox v. Clifford*, 38 Wis. 651; S. C., 20 Am. Rep. 28. So, a note dated on Sunday but made and delivered on a secular day, is binding. *Stacy v. Kemp*, 97 Mass. 166; *King v. Fleming*, 72 Ill. 21; S. C., 22 Am. Rep. 131. And a deed, though signed and acknowledged on Sunday, if delivered on another day is

valid. *Love v. Wells*, 25 Ind. 503. And, in general, the mere signing of any instrument on Sunday will not make it void, if it is not to take effect until delivery. *Beitenman's Appeal*, 55 Penn. St. 183. And a contract for the sale of goods will not be void, under the statute, unless it be made legally complete on Sunday. See *Goss v. Whitney*, 24 Vt. 187. Thus, if a request for service was made on Sunday, and it does not appear that it was accepted on that day, and subsequently, in pursuance thereof, the service was rendered on a day which was not Sunday, by the person of whom it was made, he may maintain an action upon the promise implied in the request against the person who made it. *Dickinson v. Richmond*, 97 Mass. 45. See, also, *Meriwether v. Smith*, 44 Ga. 541. And if goods are sold and delivered to A and B on the Lord's day, the sale being induced by the false representations of A, on a previous day, and subsequently, not on the Lord's day, the seller demands the price of A and he promises to pay it, this amounts to a sale to him and he is liable for the price. *Winchell v. Carey*, 115 Mass. 560; S. C., 15 Am. Rep. 151. And it is held, under the Arkansas statute, that where a contract for the sale of land is made on a week day, and a note for the purchase-money is executed on Sunday, the vendor may recover the purchase-money notwithstanding the invalidity of the note. *Tucker v. West*, 29 Ark. 386.

Evidence of an admission made on Sunday of a part-payment of a promissory note, on a week day, is admissible. *Beardsley v. Hall*, 36 Conn. 270; S. C., 4 Am. Rep. 74. And a new promise, made on Sunday, has been held sufficient to remove the bar of the statute of limitations. *Thomas v. Hunter*, 29 Md. 406. See, also, *Lea v. Hopkins*, 7 Penn. St. 492. But the decisions are not in harmony on this point. See *Bumgardner v. Taylor*, 28 Ala. 687. And it has been held that a part payment made upon Sunday will not take a debt out of the operation of the statute of limitations. *Clapp v. Hale*, 112 Mass. 368; S. C., 17 Am. Rep. 111. And the fact that an indorsement of part payment made on a promissory note bore date upon a day of the month which was Sunday, joined with evidence that it was made at the time of the payment and in the presence of both parties, and assented to by them, will warrant a jury in finding that the payment was made on that day. *Id.* A contract for an exchange of horses made on Saturday included the discharge of a debt due from one of the parties to the other, but the purchaser of the horse took possession of it on Sunday, and it was held: 1. That there was such a consummation of the contract on Saturday as made it valid; and 2. That the part-performance effected by the discharge of the debt took it out of the statute of frauds. *Peake v. Conlan*, 43 Iowa, 297.

It is not a bar to an action on an account stated, that the indebtedness was for liquor sold on Sunday, contrary to law, provided the account was not stated on Sunday. *Melchoir v. McCarty*, 31 Wis. 252; S. C., 11 Am. Rep. 605. So, a compromise of a suit on Sunday is good. *Shank v. Shoemaker*, 18 N. Y. (4 Smith) 489. Nor is it unlawful to hand a business letter to another on Sunday to be posted on Monday. And, therefore, a letter written on Saturday, left by the writer on Sunday, with request to carry it to the post-office on Monday, may be the medium of accepting a prior proposal from the person to whom it is addressed, and thus closing a lawful contract, dating from Monday, the time when the letter was posted in pursuance of the Sunday request. *Bryant v. Booze*, 55 Ga. 438.

To bring a transaction within the New York statute relating to the observance of Sunday, which declares that no person shall expose to sale any wares, etc., on Sunday, proof of a clear violation must be produced. A private sale of property, not "exposed to sale," is not within its prohibitions. *Eberle v. Mehrbach*, 55 N. Y. (10 Sick.) 682. The sale privately of a horse on Sunday by a horse-dealer to one knowing of the calling of the seller, is not such a violation of the North Carolina statute as to prevent the buyer from recovering in an action for a deceit and false warranty, brought against the seller. *Melvin v. Easley*, 7 Jones' (No. Car.) Law, 356. And it has been adjudged that the simple making of a contract was not embraced in the prohibition of "common labor" in a Sunday statute. *Bloom v. Richards*, 2 Ohio St. 388; *Horacek v. Keebler*, 5 Neb. 355; *Johnson v. Brown*, 13 Kans. 529.

In Missouri, where the plaintiffs contracted to publish an advertisement in the weekly (Sunday) edition of their paper for a year, it was held that as it did not appear and was not to be presumed that the contract contemplated any labor to be done on Sunday, it must be held to be valid. *Sheffield v. Balmer*, 52 Mo. 474; S. C., 14 Am. Rep. 430. It was, however, held in New York, that a contract to publish an advertisement in a newspaper issued on Sunday, is an agreement to do an act prohibited by the statute relative to servile labor and the sale of wares and merchandise on that day, and that the price stipulated for the service could not be recovered. *Smith v. Wilcox*, 25 Barb. 341; S. C. affirmed, 24 N. Y. (10 Smith) 353. But such contracts are now legal by statute in New York. Laws of 1871, ch. 702, p. 1533.

When a certain number of the hours of the Sabbath are fixed upon by law, as constituting, and included within the Lord's day, a contract cannot be avoided because made on that day, except upon proof that it was made within the prescribed hours. *Nason v. Dinsmore*, 34 Me. 391.

§ 4. **Works of necessity and charity.** Works of necessity and charity are excepted from the operation of Sunday statutes. And by a work of "necessity" is not to be understood a physical and absolute necessity; any labor, business, or work which is morally fit and proper to be done on that day is a work of necessity within the statute. *Flagg v. Millbury*, 4 Cush. 243. But the necessity must be a real and not a fancied one. Thus, it is not an honest belief that a necessity for traveling exists, but the actual existence of the necessity, which renders traveling on Sunday lawful. *Johnson v. Irasburgh*, 47 Vt. 28; S. C., 19 Am. Rep. 111. The clearing out of a wheel-pit on Sunday, for the purpose of preventing the stoppage, on a week day, of mills which employed many hands, is not a work of necessity or charity. *McGrath v. Merwin*, 112 Mass. 467; S. C., 17 Am. Rep. 119. One who travels on the Lord's day to ascertain whether a house, which he has hired, and into which he intends to move the next day, has been cleaned, is not traveling from necessity or charity (*Smith v. Boston, etc., R. R. Co.*, 120 Mass. 490; S. C., 21 Am. Rep. 538); and one who works by night instead of by day, and who travels on the Lord's day for the purpose of seeing his master and inducing him to change his hours of labor from the night to the day time, in order that he may sleep better, is not traveling from necessity or charity. *Connolly v. City of Boston*, 117 Mass. 64; S. C., 19 Am. Rep. 396. So, a contract for the hire of a horse and carriage on Sunday, indefinite as to time, distance, and use, is not rendered legal, as being for a purpose of necessity or charity, by the fact that the hiring is for the purpose of carrying home a person who has been attending a religious meeting during the day. *Tillock v. Webb*, 56 Me. 100. See *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; S. C., 12 Am. Rep. 720. Nor is the delivery of a quantity of flour on board a steamboat on Sunday, in order to avoid the liability of delay in getting it to market occasioned by danger of the closing of navigation, a work of necessity requiring a performance on Sunday. *Pate v. Wright*, 30 Ind. 476.

But one who travels from one town to another on the Lord's day, for the sole purpose of visiting a friend, whom he knows to be sick, and thinks may be in need of assistance, and of rendering such assistance as on inquiry he might find to be necessary, is traveling from charity. *Doyle v. Lynn, etc., R. R. Co.*, 118 Mass. 195; S. C., 19 Am. Rep. 431. And a visit to a sick child or other near relative upon the Lord's day would unquestionably fall within the exception. *Id.*; *Gorman v. Lowell*, 117 Mass. 65; *McClary v. Lowell*, 44 Vt. 116; S. C., 8 Am. Rep. 366. And as a general rule, in considering what is lawful or fit to be done on the Lord's day, "charity" must include every thing

which proceeds from a sense of moral duty, or a feeling of kindness and humanity, and is intended wholly for the purpose of the relief or comfort of another, and not for one's own benefit or pleasure. *Id.*; *Bennett v. Brooks*, 9 Allen, 118. Acts to prevent or relieve suffering of men or animals are undoubtedly within the exception. *Commonwealth v. Sampson*, 97 Mass. 407. Baking provisions for customers on Sundays was held to be within the exception. *Rex v. Cox*, 2 Burr. 787; *Rex v. Younger*, 5 Term R. 449. Whether the meeting which the plaintiff attended was of a religious character, and whether the plaintiff attended it for the purpose of divine worship and religious instruction, so as to bring him within the exception of the statute, is for the jury. *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; 12 Am. Rep. 720.

§ 5. **Its effect upon other acts.** A person, who travels on Sunday in violation of the statute, cannot maintain an action for injuries received by reason of the insufficiency of the highway (*Cratty v. City of Bangor*, 57 Me. 423; S. C., 2 Am. Rep. 56; *Johnson v. Town of Irasburgh*, 47 Vt. 28; S. C., 19 id. 111), because his own fault in illegally traveling on that day necessarily contributes to the injury. *Jones v. Andover*, 10 Allen, 18. If a man travels on Sunday, in violation of a statute, and, while so traveling, fastens his horse at the side of a road, and the horse is injured by the negligent act of another in driving against it, the unlawful traveling necessarily contributes to the injury, and no action lies for the injury sustained. *Lyons v. Disotelle*, 124 Mass. 387. And it is held that an action will not lie against a carrier for breach of its *general* duty in failing to carry passengers on Sunday. *Walsh v. Chicago, etc., Railway Co.*, 42 Wis. 23; S. C., 24 Am. Rep. 376. See Vol. 2, tit. *Common Carriers*.

But where a person walked about a mile in a town on Sunday, for exercise, she was held not to be a traveler in such a sense as to bar her recovery against the town for injuries suffered during such walk, from a defect of the highway. *O'Connell v. City of Lewiston*, 65 Me. 34; S. C., 20 Am. Rep. 673. And the fact that the plaintiff was driving his cattle to market on Sunday, in violation of the statute, when they were injured by the breaking down of a defective bridge which the defendant town was bound to maintain, was held not to bar a recovery upon due proof of the defendant's negligence in constructing and maintaining such bridge. *Sutton v. Town of Wauwatosa*, 29 Wis. 21; S. C., 9 Am. Rep. 534. And see *Carroll v. Staten Island R. R. Co.*, 58 N. Y. (13 Sick.) 126; S. C., 17 Am. Rep. 221.

It is well settled that Sunday is *dies non juridicus*. *Nabors v. State*, 6 Ala. 200; *Swann v. Broome*, 3 Burr. 1595; *Story v. Elliott*,

8 Cow. 27. But a court of equity may lawfully issue an injunction on Sunday where it is necessary to prevent an irreparable injury to property. *Langabier v. Fairbury, etc., R. R. Co.*, 64 Ill. 243; S. C., 16 Am. Rep. 550. And a cause having been submitted to a jury late on Saturday night, and the jury having agreed on a verdict on the next day, Sunday, it is lawful for the court to receive it on that day and adjourn the court until the next day. *Reid v. State*, 53 Ala. 402; S. C., 25 Am. Rep. 627; *Allen v. Godfrey*, 44 N. Y. (5 Hand) 433. So, it has been held that an award of arbitrators made and published on Sunday is not void. *Blood v. Bates*, 31 Vt. 147. And see *Crosby v. Blanchard*, 50 id. 696. But see *contra*, *Story v. Elliot*, 8 Cow. 27. A notice given on Sunday by a surety on a note to the holder, that he must collect the same of the principal, is void. *Chrisman v. Tuttle*, 59 Ind. 155. And the court will take judicial notice that the date of such notice is on Sunday, if such be the fact. Id.

A municipal ordinance forbidding the sale of goods on Sunday, but excepting from its operation those keeping their business places closed on Saturday, is held to be unconstitutional, as giving to Jews a privilege denied to others. *City of Shreveport v. Levy*, 26 La. Ann. 671; S. C., 21 Am. Rep. 553.

§ 6. **Who may set up the defense.** See *ante*, pp. 68, 69, Art. 1, §§ 5, 6.

§ 7. **How interposed.** See *ante*, p. 70, Art. 1, § 7. If a contract be void, as entered into on a Sunday, that objection must be pleaded specially, but need not aver that the contract was against the statute. *Peate v. Dicken*, 1 Cr. M. & R. 422, 427.

CHAPTER XXXII.

IMPOSSIBLE CONTRACTS.

ARTICLE I.

GENERAL RULES.

Section 1. In general. The principle, that a contract, in order to be valid, must be founded upon a sufficient consideration and must be binding upon both parties, has already been stated in the chapter treating upon the general principles of contracts, and the subject of this chapter has been incidentally touched upon in that connection.

An impossible contract may be defined to be one which the law will not hold binding upon the parties, because of the natural or legal impossibility of the performance by one party of that which is the consideration for the promise of the other. As to a contract or promise to perform that which is naturally impossible, and so clearly so that its impossibility of accomplishment must be evident to both parties at the time of contracting, the law holds that no right can be thereby created, nor any obligation incurred. Powell on Cont. 160. Such a promise, therefore, lacks the essential elements of a consideration, since the promisor can suffer no detriment by reason of it, and the promisee can derive no possible benefit or advantage from it, and the mere words of compact are therefore a nullity. If, in any case, the fact that such a promise was made can be of any advantage to the promisee, that advantage may, in the absence of fraud, be a consideration sufficient to support the contract on his part, but the promise by itself is not. 1 Pars. on Cont. 460.

Promises to build a large house in a day, to walk a thousand miles in an hour, to overturn an immense building with one finger, and the like may be given as instances of promises involving a natural impossibility, which the parties can hardly be supposed to have made or accepted in earnest, but which are in all cases wholly void. A covenant by C, to pay a sum of money to A, B, and to himself (C) or the survivor or survivors of them on their joint account, has been held senseless and impossible, and not binding upon C. *Faulkner v. Lowe*, 2 Exch. 595.

As to contracts which are void for legal impossibility, the distinction between them and those which are void for illegality of consideration is sometimes very nice. The law either expressly declares the latter to be void, or holds them to be such because they are in direct contravention of its provision or its policy; while the former are impossible because the law gives the promisor no authority to perform his promise, and will not make his performance effectual for any purpose; and, because of such impossibility, they are void. Contracts which are void for illegality of consideration are far more numerous than those of the class we are now considering. As instances of the latter class—a promise by A to B, to discharge a debt due from B to C, made without the consent or authority of C, is legally impossible, because C cannot be compelled to recognize or adopt such a discharge, and will not be estopped by it (*Harvy v. Gibbons*, 2 Lev. 161); a contract whereby S., in consideration that C. shall buy certain land, and give S. one-half it may sell for in excess of \$200, undertakes that such land “shall sell on or before the 1st October next for \$200,” is legally impossible, because S. has no power to compel the sale of land within the time named (*Stevens v. Coon*, 1 Pin. [Wis.] 356), and a promise by the assignees of a bankrupt, made to a third party, that both they and the commissioners in bankruptcy shall forbear to examine the bankrupt in respect to certain moneys received by him, in consideration of the payment of the amount by such third party, is not only in violation of the duty of such assignees, but it is impossible of performance by them, because they cannot control the action of the commissioners. *Nerot v. Wallace*, 3 Term R. 17.

In the latter case, Lord KENYON lays down the rule, that “every person who, in consideration of some advantage, either to himself or to another, promises a benefit, must have the power of conferring that benefit up to the extent to which that benefit professes to go, and that not only in fact, but in law,” otherwise his promise is no consideration for the undertaking of the other party.

§ 2. **When a defense.** If a person is absurd or foolish enough to promise to do a thing which is in its own nature and obviously impossible of performance, the other party cannot expect that it will be performed, nor base any action upon such an expectation; nor will the law aid him by compelling or attempting to compel the promisor to perform, or by imposing damages upon him for non-performance. If sued upon such promise, he may set up the impossibility as a defense; and if he seeks to enforce by law the contract of the other party, the latter may avail himself of the same defense. *Powell on Cont.* 160; 1 Pars. on Cont. 459.

And so also, if the promise is to do that which the promisor has no legal power to perform. The impossibility of an effectual performance of such a promise by the maker is as obvious and as great as in the former case, and the promisee can have no better grounds for relying upon it. It is, therefore, beyond the power of the courts to compel performance, and they will not in any manner recognize the promise as a binding obligation on his part; nor is there ordinarily any ground upon which they can enforce the contract of the other party. 1 Pars. on Cont. 461. See the next section.

An impossibility of performance arising subsequent to the promise may, in some cases, be relieved against in equity, but the mere hardship or difficulty of performance is not of itself ground for relief, unless it amounts to so great inconvenience and absurdity as to afford judicial proof that the agreement could not have been intended. Story on Cont. 464. Such an impossibility, arising from the act of God, of the law, or of the other party, is also a good excuse at law for the non-performance of a contract. Thus the non-performance of a contract for personal appearance, or for personal services, may be excused by the sickness and death of the promisor. *People v. Manning*, 8 Cow. 297; *Fahy v. North*, 19 Barb. (N. Y.) 341; *Wolfe v. Howes*, 24 id. 174, 666; *Green v. Gilbert*, 21 Wis. 395. The failure to redeliver a horse upon request as agreed is excused by the death of the horse before request for its redelivery (*Williams v. Lloyd*, W. Jones, 179), and a failure to appear in compliance with a recognizance may be excused by an arrest and imprisonment in another county (*People v. Bartlett*, 3 Hill [N. Y.], 570), or imprisoned by a valid order or judgment of another court (*Belding v. State*, 25 Ark. 315; 4 Am. Rep. 26), and a failure to completely perform a contract for a public work may be excused by the repeal of the statute authorizing its construction. *Jones v. Judd*, 4 N. Y. 411.

The inability of the principal, by reason of sickness, to appear at court and answer an indictment found against him, according to the terms of his recognizance, is a good defense to an action brought against his sureties upon the recognizance. *People v. Withers*, 37 N. Y. (10 Tiff.) 586; 5 Trans. App. 342. So, of the enlistment of the principal in the United States army in a time of war. *People v. Cushney*, 44 Barb. 118; 30 How. 110; *Commonwealth v. Terry*, 2 Duv. (Ky.) 383. But see *State v. Scott*, 20 Iowa, 63.

§ 3. **When not a defense.** A promise cannot be avoided merely because its execution is difficult, impossible or contingent. If a party by his contract charges himself with an obligation possible to be performed, he must make it good, unless its performance is rendered im-

possible by the act of God, of the law, or of the other party. Unforeseen difficulties, however great, will not excuse him. *Dermott v. Jones*, 2 Wall. 1; 2 Pars. on Cont. 672, note *h*. It is the duty of the promisor well to weigh the difficulty or improbability before making his promise.

It is no defense to an action for the non-performance of a contract to build a house at a certain place by a day named, that there was a latent defect in the soil, in consequence of which the walls sank and cracked. *Id*. It is no defense to an action for the non-delivery of merchandise of the quality contracted for, that the season was not suitable for procuring that quality. *Gilpins v. Consequa*, 1 Pet. (C. C.) 85. It is no defense for a failure to perform a contract that a ship shall proceed to a foreign port and take on a cargo, and transport and deliver it at another port, that a hostile embargo has been laid, under which the ship would be liable to seizure. *Atkinson v. Ritchie*, 10 East, 530. Obstructions in navigation furnish no defense for the breach of a contract to deliver merchandise by a day fixed. *Dodge v. Van Lear*, 5 Cranch (C. C.), 278; *Harmony v. Bingham*, 12 N. Y. 99.

If an absolute undertaking for the delivery of goods is not performed, the promisor cannot excuse himself on the ground that they were lost or destroyed on the way. *Thompson v. Miles*, 1 Esp. 184. A covenant by a tenant to repair is binding, and it is no defense to an action thereon, that the premises have been destroyed by fire. *Bullock v. Dommitt*, 6 Term R. 650. If a man, for a few shillings paid to him, contracts to deliver two grains of rye on the next Monday, and on each succeeding Monday during the year double the quantity delivered the preceding Monday, the law will hold him bound, though the total quantity will be so great as to render it utterly impossible for him to deliver it; and such impossibility will be no defense to an action to recover damages for his failure to deliver.

If the impossibility applies to the promisor personally, there being neither natural impossibility in the thing, nor illegality nor immorality, then he is bound by his undertaking, and it is a good consideration for the promise of another, and neither party can set up the impossibility as a defense to an action thereon. Pars. on Cont. 461; *Blight v. Page*, 3 B. & P. 296, *n*; *Worsley v. Wood*, 6 Term R. 718. If the party promising cannot himself perform, it may be in his power to procure some one else to do so for him, and the promisee has a right to expect that he will do so, and is therefore without fault or folly in entering into the contract, and, in cases of non-performance by the promisor, is entitled to recover damages.

Thus, if a man contracts to sell goods which he does not own at the

date of the contract, he is bound to procure them, in order to fulfill his engagement, and the refusal of the owner to part with them will not excuse him (*Hibblewhite v. McMorine*, 5 M. & W. 462; *Paradine v. Jane*, Aleyn, 27; *Fischel v. Scott*, 15 C. B. 69); and if he contracts to sell an estate the title to which is in another person, he will be liable in damages for non-performance, though equity will not compel the conveyance, and if a lessee promises to procure his landlord's consent to an assignment of his lease, he is bound thereby, although he cannot compel his landlord to consent (*Lloyd v. Crispe*, 5 Taunt. 249); and if one of several partners agrees to introduce a third party into the firm, though he does so without the knowledge or concurrence of the other partners, he is himself liable for a non-performance of such agreement; and if a person contracts to perfect a patent right in a foreign country for the benefit of another, such contract is binding upon him, though it may be impossible of performance without the aid of a special statute. *Beebe v. Johnson*, 19 Wend. 500.

In none of these cases will the impossibility of performance by the promisor avail as a defense to an action for the non-performance of his promise. *Ib.*

As to a defense by sureties in a recognizance, that their principal was confined in a penitentiary of another State, where he had been convicted of a felony, see *Cain v. State*, 55 Ala. 170; *Taylor v. Taintor*, 16 Wall. 366; 36 Conn. 242; 4 Am. Rep. 58; *ante*, p. 126, § 2.

CHAPTER XXXIII.

INFANCY.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. In general. It is a well-settled and familiar rule of the common law, that, until a person is twenty-one years of age, he is, in law, an infant, and is incapable of entering into a binding contract. Before that age, the law presumes his faculties to be immature, undisciplined, and incompetent to guard against artifice and subtlety, and it therefore extends to all contracts, previously made, its protection and guardianship. Co. Litt. 172, 381; 1 Story on Cont., § 99. But at the age of twenty-one years, the protection afforded to infants against improvident bargains and the artifices of designing persons ceases, and an absolute and unlimited legal liability to contract commences. This limit was probably adopted by analogy to the feudal law, by which the tenant was presumed to have acquired, at the age of twenty-one, sufficient bodily strength to attend the lord in his wars; and therefore ceased to be the ward of his guardian in chivalry. Co. Litt. 78 *b*, 171 *b*; 1 Chit. on Cont. (11th Am. ed.) 194. But see 1 Bl. Com. 464. The English common-law rule as to the full age of majority, above stated, applies to both sexes, and generally obtains in the United States, but in some of the States, female infants obtain their majority at the age of eighteen years. This is the case in Illinois, *Kester v. Stark*, 19 Ill. 328. In Vermont, *Sparhawk v. Buell*, 9 Vt. 41. In Ohio, 1 R. S., ch. 56, § 1. And in Nebraska, R. S., ch. 22, § 1. So, in Maryland, female infants, at eighteen, have the right to dispose of their real estate by will (Code, Art. 93, § 300. See, also, *Corrie's Case*, 2 Bland's Ch. 488, 501; *Davis v. Jacquin*, 5 Harr. & J. [Md.] 100); and by statute, in Texas, every female under the age of twenty-one years, who shall marry in accordance with the laws of the State, shall, from and after the time of such marriage, be deemed to be of full age. *Chubb v. Johnson*, 11 Tex. 469. And see *White v. Latimer*, 12 id. 61.

In computing the age of a person the day of his birth is included. A person is, therefore, of the age of "twenty-one years" the day

before the twenty-first anniversary of his birth-day. Thus, if a person were born at any hour of the first of January, 1801 (even a few minutes before 12 o'clock of the night of that day), he would be of full age at the first instant of the 31st of December, 1821, although nearly forty-eight hours before he had actually attained the full age of twenty-one, according to years, days, hours, and minutes, because there is not in law in this respect any fraction of a day, and it is the same whether a thing is done, upon one moment of the day or another. *Anon.*, 1 Salt. 44; *Howard's Case*, 2 id. 625; *Herbert v. Turball*, 1 Sid. 162; S. C., 1 Keb. 589; *Fitz Hugh v. Dennington*, 6 Mod. 260; 1 Chit. Gen. Prac. 766; *Roe v. Hersey*, 3 Wils. 274; *Hamlin v. Stevenson*, 4 Dana (Ky.), 597. It follows that a person may, upon any and every moment of the day before his twenty-first birth-day, do any act which any man may lawfully do. *Id.*; *State v. Clarke*, 3 Harr. (Del.) 557.

So, the doctrine is laid down, that a person who has attained the age of majority by the law of his native domicile, is to be deemed everywhere the same of age; and, on the other hand, that a person, who is in his minority by the law of his native domicile, is to be deemed everywhere in the same state or condition. Story on Confl. of Laws, § 52. See, also, *Barrera v. Alpuente*, 6 Mart. (La., N. S.) 69. It is, however, observed, that this rule is to be taken with important qualifications. The state and condition of the person, according to the law of his domicile, will generally, though not universally, be regarded in other countries as to acts done, or rights acquired, or contracts made, in the place of his native domicile; but as to acts, rights, and contracts done, acquired, or made, out of his native domicile, the *lex loci* will generally govern in respect to his capacity and condition. 2 Kent's Com. 233, note *c*. If, for instance, a person be a minor by the law of his domicile until the age of twenty-five, yet, in another country, where twenty-one is the age of majority, he may, on attaining that age, make in such other country a valid contract. *Id.* And see *Male v. Roberts*, 3 Esp. 163; *Saul v. His Creditors*, 5 Mart. (La., N. S.) 579, 597; *Thompson v. Ketcham*, 8 Johns. 189; Vol. 2, p. 626 *et seq.* Marriage operates as an emancipation of an infant. *Northfield v. Brookfield*, 50 Vt. 62; *Sherburne v. Hartland*, 37 id. 528. A marriage contracted by an infant, under the age of legal consent, is not absolutely void, but voidable only, and, until disaffirmed, is a marriage in fact and sufficient to support a prosecution for bigamy in contracting a second marriage. *Cooley v. State*, 55 Ala. 162.

Where judgment, discretion and experience are essentially necessary to the proper duties of an office, such as that of a judge or justice of the peace, an infant cannot execute such duties. *Golding's Petition*,

57 N. H. 146; 24 Am. Rep. 66. A verdict will not be set aside because one of the jurors was an infant, where his name was on the list of jurors returned and impaneled, though the losing party did not know of the infancy until after the rendition of the verdict. *Wassum v. Feeney*, 121 Mass. 93; 23 Am. Rep. 258.

§ 2. **As a defense upon contracts generally.** The contracts of infants are usually divided into three classes, namely: such as are binding, such as are void, and such as are voidable only. The distinctions laid down in a case which has been frequently approved, are, that where the court can pronounce that the contract is for the benefit of the infant, as for instance, for necessities, there it shall bind him; when it can pronounce it to be to his prejudice, it is void; and that where it is of an uncertain nature, as to benefit or prejudice, it is voidable only, and it is in the election of the infant to affirm it or not. *Keane v. Boycott*, 2 H. Bl. 511. And see *Regina v. Lord*, 12 Q. B. 757; *United States v. Bainbridge*, 1 Mas. (C. C.) 82; *Wheaton v. East*, 5 Yerg. (Tenn.) 41; *Cronise v. Clark*, 4 Md. Ch. 403; 2 Kent's Com. 236; *Robinson v. Weeks*, 56 Me. 102; *Monumental, etc., Asso. v. Herman*, 33 Md. 128. The rule that the court or the jury must determine whether the contract was beneficial or prejudicial to the infant, and which holds the contract to be voidable or void, according to the result of such finding, has, however, been rejected by many of the courts in modern times, as unsatisfactory and unsafe in its application, and as often contravening the principle upon which it was founded, namely: the benefit of the infant; and they hold it to be certainly more conducive to his benefit to afford him the opportunity of affirming, when of age, a contract which he may determine to be beneficial, than for the court or jury to determine this question for him. *Weaver v. Jones*, 24 Ala. 420, 424; *Cole v. Pennoyer*, 14 Ill. 158; *Fonda v. Van Horne*, 15 Wend. 631, 635; *Slocum v. Hooker*, 13 Barb. 536; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236; *Cummings v. Powell*, 8 Tex. 80; *Bozeman v. Browning*, 31 Ark. 365, 374. From the numerous decisions in this country, the following definite rule has been deduced, as one that is subject to no exceptions: "The only contract binding on an infant is the *implied* contract for necessities; the only act which he is under a legal incapacity to perform, is the appointment of an attorney; all other acts and contracts, executed or executory, are voidable or confirmable by him at his election." 1 Am. Lead. Cas. (5th ed.) 300. And see *Mustard v. Wohlford*, 15 Gratt. (Va.) 329; *Hardy v. Waters*, 38 Me. 450; *Bryan v. Walton*, 14 Ga. 185; Vol. 5, p. 61. Even a power of attorney has been held only voidable. *Hastings v. Dollarhide*, 24 Cal. 195. But see *Cole v. Pennoyer*, 14 Ill. 158; *Philpot v. Bingham*,

55 Ala. 435; *Knox v. Flack*, 22 Penn. St. 337, holding that the appointment of an attorney by an infant is absolutely void. See, also, *Pickler v. State*, 18 Ind. 266; *Tucker v. Moreland*, 10 Pet. 58. In *Dunton v. Brown*, 31 Mich. 182, it is said that only such agreements, as are not possible to be regarded as beneficial to the infant, are null from the beginning. And it is there held that an infant's partnership agreement is not void, but voidable merely. See, also, *Goode v. Harrison*, 5 B. & Ald. 147. And see Vol. 5, p. 61 *et seq.* In *Riley v. Mallory*, 33 Conn. 201, the doctrine stated is, that an infant may rescind all contracts before or after he comes of age, whether they are fair or not, and whether executed or executory, except contracts for necessities, contracts to do that which he may be compelled in equity to do, and contracts which he has so enjoyed that the other party cannot be restored to his original position.

§ 3. **Contracts for services.** It has been held that the contract of an infant in binding himself an apprentice, being an act manifestly for his benefit, is binding in law; and when bound, he cannot dissolve the relation. *King v. Arundel*, 5 M. & S. 257; *Wood v. Fenwick*, 10 M. & W. 195; *Woodruff v. Logan*, 6 Ark. 276. He may, however, by the common law, set up his infancy as a defense for the violation of his covenants (*Whitley v. Loftus*, 8 Mod. 190; *Harper v. Gilbert*, 5 Cush. 417; *Blunt v. Melcher*, 2 Mass. 228), and, in this country, articles of apprenticeship, except by force of some statute, are generally deemed voidable at the election of the minor. See *Peters v. Lord*, 18 Conn. 337; *Harney v. Owen*, 4 Blackf. (Ind.) 338; *Clark v. Goddard*, 39 Ala. 164; *Handy v. Brown*, 1 Cr. (C. C.) 610; *Nickerson v. Easton*, 12 Pick. 112. See Vol. 4, p. 391 *et seq.* So, a contract for labor or service entered into by an infant is voidable by him at his election (*Langham v. The State*, 55 Ala. 114; *Francis v. Felmit*, 4 Dev. & Bat. [No. Car.] 498; *Vent v. Osgood*, 19 Pick. 572), and if, by the terms of a special contract, he is to serve for a certain time for a certain sum, and before the expiration of the term the infant leaves without the consent or fault of the employer, the contract is avoided, and the infant may recover on an implied promise the value of his services, to be determined by the benefit and injury occasioned by him. *Thomas v. Dike*, 11 Vt. 273; *Hoxie v. Lincoln*, 25 id. 206; *Lowe v. Sinklear*, 27 Mo. 308; *Ray v. Haines*, 52 Ill. 485; *Dallas v. Hollingsworth*, 3 Ind. 537. But on the last point stated, the authorities differ, many of the cases holding that, when an infant has legally avoided his contract for labor, the rights of the parties thereto are precisely the same as if it had never been made. *Robinson v. Weeks*, 56 Me. 102. Thus, it is held that where a minor, who agrees to work for a manufacturing

company six months, at least, and to give no less than two weeks' notice before leaving, but does leave before the expiration of the time, and without giving such notice, he is not liable to have the damages occasioned thereby deducted from what he would otherwise be entitled to recover for his labor. *Derocher v. Continental Mills*, 58 Me. 217; S. C., 4 Am. Rep. 286. See Vol. 5, p. 62.

Where an infant is taken into a family, it is always the presumption that neither its support nor its services are to be compensated except as the one compensates the other. *Thorp v. Bateman*, 37 Mich. 68. Thus, where an infant, whilst out of place, was permitted to reside with his uncle, and during such time was provided with food and clothing, and worked in the same way as the children of the family, it was held that the law did not imply a contract to pay for such services of the infant. *Defrance v. Austin*, 9 Penn. St. 309. See, also, *Mountain v. Fisher*, 22 Wis. 93; *Wilhelm v. Hardman*, 13 Md. 140. Vol. 3, p. 584.

A contract made by an infant to work a certain specified time with a mechanic, upon the consideration of the latter's boarding and clothing him, and learning him a trade, is not binding upon the infant, and he may at any time leave the service, provided he has not arrived at full age and confirmed the contract. *Francis v. Felmit*, 4 Dev. & B. (No. Car.) L. 498. So, in a action for a breach of contract to labor for the plaintiff a given time in a distant State, in consideration of an outfit furnished by the plaintiff to the defendant, the plea of infancy is a valid one, even if there has been no offer to restore the cost of the outfit. *Craighead v. Wells*, 21 Mo. 404.

And it is held that bounty-money, received by a minor upon his enlistment into the military service of the United States, is a gift to him, and not wages; and an agreement by him to give such bounty to his father or master for permitting him to enlist is voidable by such minor on the ground of infancy. *Mears v. Bickford*, 55 Me. 528; *Holt v. Holt*, 59 id. 464; *Kelly v. Sprout*, 97 Mass. 169. See, also, *Caughey v. Smith*, 50 Barb. 351.

§ 4. **Contracts for necessities.** It is a well-established doctrine that contracts for "necessaries" are binding upon an infant (Vol. 5, p. 63); but, even upon such contracts, only the value of the articles furnished can be recovered. *Hyier v. Hyatt*, 3 Cr. (C. C.) 276; *Parsons v. Keys*, 43 Tex. 557. And all the authorities concur in the rule, that if an infant live with his parent or guardian, who duly cares and provides for him, he cannot bind himself for necessities. See Vol. 5, p. 64; *Kraker v. Byrum*, 12 Rich. (So. Car.) Eq. 163; *Wailing v. Toll*, 9 Johns. 141; *Guthrie v. Murphy*, 4 Watts (Penn.), 80. Nor is he liable

for necessities merely because his father is poor and unable himself to pay for them. *Hoyt v. Casey*, 114 Mass. 397; S. C., 19 Am. Rep. 371.

The principle underlying the decisions is, that the control of the parent, or of the guardian who occupies the place of the parent, over the minor, is indispensable to the good order of society, and cannot be maintained unless it is exclusive and unquestionable. The infant cannot, of course, be permitted to judge for himself, for this would be to do away with the very object had in view by the appointment of guardians. Nor can it make any difference that the person who deals with the infant is not aware of the fact that he was an infant and had a guardian. It is his duty to inquire. *Id.*; *Charters v. Bayntun*, 7 Car. & P. 52; *Cook v. Deaton*, 3 *id.* 114. And the very fact that an infant has an ample estate is a strong reason for adhering to the general rule above stated; for it is precisely in such cases that the infant stands most in need of its protection from his own thoughtless improvidence. *Rivers v. Gregg*, 5 Rich. (So. Car.) Eq. 274; *Kline v. L'Amoureux*, 2 Paige, 421; *Nichol v. Steger*, 2 Tenn. Ch. 328. But if one furnish an infant with necessities, and also other articles, not necessary under his circumstances and condition, he is not, on that account, precluded from recovering for the necessities. *Bent v. Manning*, 10 Vt. 225. And an infant is liable for money paid at his request, to satisfy a debt which he had contracted for necessities. *Swift v. Bennett*, 10 Cush. 436; *Randall v. Sweet*, 1 Denio, 460. As to what are "necessaries" for which an infant may bind himself by contract, see Vol. 5, pp. 64, 65; *id.*, pp. 528, 529. It has been thought that presents to one who eventually becomes the infant's wife are necessities. *Jenner v. Walker*, 19 L. T. (N. S.) 398. So, an infant has been held liable for a wedding suit for himself. *Sams v. Stockton*, 14 B. Monr. (Ky.) 187. But he is not liable for necessities furnished to a person he is about to marry, and in view of that marriage. *Turner v. Trisby*, 1 Strange, 168. It seems that the ordinary fees of an attorney for the prosecution of an infant's rights to property will not generally be deemed necessities; but such services, where requisite for the personal relief, protection and support of the infant, may lawfully be contracted for, and the infant will be bound in law to pay for them. See Vol. 5, p. 529. Thus it was held, that a female infant might employ an attorney to prosecute one who had seduced her, and would be bound to pay him for his services and expenditures. *Munson v. Washband*, 31 Conn. 303. So, an infant is liable for necessities, for services of an attorney rendered in defending him in a bastardy proceeding. *Barker v. Hibbard*, 54 N. H. 539; S. C., 20 Am. Rep. 160. A good common school education is now fully recognized as one of the necessities for an infant. *Raymond v. Loyl*, 10

Barb. 487; *Middlebury College v. Chandler*, 16 Vt. 683. But, in this country, a collegiate education is not ranked among the necessities, for which an infant can render himself absolutely liable by contract. *Id.*

While infants are liable for necessities, they are not liable on their contracts for a price certain, or on a bill or note for the amount. Express contracts, as by bond, note, or account stated, fixing prices for necessities, are not, as such, binding, and cannot be enforced without ratification. *Trueman v. Hurst*, 1 Term R. 40; *Cole v. Pennoyer*, 14 Ill. 158; *Beeler v. Young*, 1 Bibb (Ky.), 519; *Martin v. Gale*, L. R., 4 Ch. Div. 428; 20 Eng. Rep. 660; 1 Am. Lead. Cas. (5th ed.) 301. Whether the articles purchased were necessities, and whether the sum agreed to be paid was a fair price, are questions to be determined by the court. *Stone v. Dennison*, 13 Pick. 1; *Parsons v. Keys*, 43 Tex. 557. And see *Tupper v. Cadwell*, 12 Metc. 559; *Stanton v. Willson*, 3 Day (Conn.), 37; *Phelps v. Worcester*, 11 N. H. 51. It was, however, held in *Dubose v. Wheddon*, 4 McCord (So. Car.), 221, that an infant can bind himself by a promissory note, for necessities. So, an infant was held to be responsible on an account stated, in *Williams v. Moor*, 11 M. & W. 256.

§ 5. **Contracts by negotiable instruments, etc.** The tendency of modern decisions is undoubtedly in favor of the reasonableness and policy of a very liberal extension of the rule, that the acts and contracts of infants should be deemed *voidable* only, and subject to their election when they become of age, either to affirm or disallow them. See *ante*, p. 131, § 2. Thus, it is now well settled that the negotiable note of an infant is not void, but voidable only. *Goodsell v. Myers*, 3 Wend. 479; *Best v. Givens*, 3 B. Monr. (Ky.) 72; *Young v. Bell*, 1 Cr. (C. C.) 342; *Wright v. Steele*, 2 N. H. 51; Vol. 5, p. 66. An infant may make or indorse a promissory note or bill of exchange, and, as to him, the note in the one case and the indorsement in the other will not be void, but *voidable* at his election (*Hardy v. Waters*, 38 Me. 450; *Nightingale v. Withington*, 15 Mass. 272; *Slocum v. Hooker*, 13 Barb. 536); and such is now the general rule as to all his parol contracts. *Id.* And see *Lumsden's Case*, L. R., 4 Ch. App. 31. And not only so, but bonds and other sealed instruments are now considered as governed by the same rule as simple contracts; and if not manifestly of a prejudicial character they are not void, but voidable (*Ridgeley v. Crandall*, 4 Md. 435; *Keil v. Healey*, 84 Ill. 104; 25 Am. Rep. 434; *Irvine v. Irvine*, 9 Wall. 617; *Wellborn v. Rogers*, 24 Ga. 558; *Cummings v. Powell*, 8 Tex. 80; *Phillips v. Green*, 5 T. B. Monr. [Ky.] 344; *Wheaton v. East*, 5 Yerg. [Tenn.] 41; *Jenkins v. Jenkins*, 12 Iowa, 195; *Harrod v. Myers*, 21 Ark. 592; *Chapman v. Chapman*, 13 Ind. 396;

Cook v. Toubms, 36 Miss. 685); so held, of a bond for title given by an infant (*Bozeman v. Browning*, 31 Ark. 364; *Mustard v. Wohlford*, 15 Gratt. 329; *Weaver v. Jones*, 24 Ala. 420); so of a mortgage made by an infant. *State v. Plaisted*, 43 N. H. 413; *Palmer v. Miller*, 25 Barb. 399. But see *Adams v. Ross*, 30 N. J. Law, 505. And leases to infants are held to be only voidable. *Baxter v. Bush*, 29 Vt. 465; *Griffith v. Schwenderman*, 27 Mo. 412. So, of the recognizance of an infant. *Patchin v. Cromach*, 13 Vt. 330; *State v. Weatherwax*, 12 Kans. 463. It is, however, held that the deed of an infant *feme covert* is void. *Schrader v. Decker*, 9 Penn. St. 14; *Magee v. Welsh*, 18 Cal. 155; *Mackey v. Proctor*, 12 B. Monr. (Ky.) 433. But see *Scott v. Buchanan*, 11 Humph. (Tenn.) 468. So, it may be deemed pretty well settled by the authorities, that a power of attorney to sell lands, a warrant of attorney, or any other creation of an attorney, by an infant, is absolutely void. *Lawrence v. McArter*, 10 Ohio, 38; *Waples v. Hastings*, 3 Harr. (Del.) 403; *Knox v. Flack*, 22 Penn. St. 337; *Philpot v. Bingham*, 55 Ala. 435. But see *Hastings v. Dollarhide*, 24 Cal. 195; *King v. Bellord*, 32 L. J. Ch. 646. The reason assigned is, that the constituting of an attorney by one whose acts are in their nature voidable, is repugnant and impossible, for it is imparting a right which the principal does not possess — that of doing valid acts. If the acts, when done, remain voidable, at the option of the infant, then he has done, through the agency of another, what he could not have done directly. 1 Am. Lead. Cas. 250; *Armitage v. Widoe*, 36 Mich. 124. See *ante*, p. 131, § 2. And it is held that where a minor has not reached the age of majority in the country where she is domiciled, she cannot execute a power of attorney to do acts in a State or country where, by the laws of that State, a minor obtains her majority at an earlier age. *Kohne's Estate*, 1 Pars. (Penn.) 399. But it would seem that an authority given to another by an infant, otherwise than by an instrument under seal, to do an act which the infant himself might do, is not void. Thus, it is held that an infant promisee of a negotiable note may, by parol, authorize another to transfer such note by indorsement for him, and the transfer so made is valid, until avoided. *Hardy v. Waters*, 38 Me. 450. And see *Hastings v. Dollarhide*, 24 Cal. 195; *Whitney v. Dutch*, 14 Mass. 457. But see *Thomas v. Roberts*, 16 M. & W. 778.

An assignment for the benefit of creditors made by copartners is not fraudulent and void in law, because one of the assignors is an infant. *Yates v. Lyon*, 61 N. Y. (16 Sick.) 344; reversing S. C., 61 Barb. 205. An assignment by an infant for the benefit of creditors, if not entirely valid, is at the most only voidable. *Soper v. Fry*, 37 Mich. 236.

A single bill — that is, a bond without a condition — made by an infant, although the consideration be something else than necessities, is *voidable* merely, and may be ratified by him after he obtains his majority, so as to entitle the payee to maintain an action thereon. *Fant v. Cuthcart*, 8 Fla. 725. So, if an infant receives a sum of money, and covenants to pay it over in specified amounts to particular persons in another State, the covenant is *voidable* merely, and not void. Such contract is not necessarily prejudicial to the infant, nor does he thereby subject himself to damages, or a breach of trust in respect of a third person. *West v. Penny*, 16 id. 186.

An exchange of property made by a minor is voidable. *Williams v. Brown*, 34 Me. 594; *Grace v. Hale*, 2 Humph. (Tenn.) 27. And, in general, infants may avoid the sale of their chattels, or lands, or any contract or agreement to surrender or release their rights, for which they are entitled to an equivalent. *Baker v. Lovett*, 6 Mass. 78; *Bryan v. Walton*, 14 Ga. 185. But an infant who receives property under a contract of sale to him, and then surrenders it to the seller, intending to give up all his interest in it, cannot afterward avoid such surrender, and retake the property from the possession of the seller. *Edgerton v. Wolf*, 6 Gray, 453. And where lands are purchased by a firm, one of the members of which is a minor, he cannot recover back from the vendor his share of the purchase-money paid, as the contract is binding on his copartners who had a right to control the funds of the firm. *Sadler v. Robinson*, 2 Stew. (Ala.) 520. But it has been held that infancy is an available defense in an action upon contract, brought to enforce a joint liability against the infant as a secret partner. *Vinsen v. Lockard*, 7 Bush (Ky.), 458.

An infant is not liable to an action for a breach of promise of marriage, though he may maintain the action. Vol. 1, p. 727; *Frost v. Vought*, 37 Mich. 65. But *executed* contracts of marriage are binding upon an infant. By the common law, the age of consent, at which the contract of marriage may be made, is fourteen years in a male, and twelve in a female, and a marriage entered into after that age, and before majority, is valid, and cannot be avoided. *Parton v. Hervey*, 1 Gray, 119; 1 Story on Contracts, § 124. See *Beggs v. State*, 55 Ala. 108; *May v. State*, id. 164. And a husband, though an infant, is liable for debts contracted by his wife before marriage. *Butler v. Breck*, 7 Metc. (Mass.) 164.

§ 6. Confirmation upon full age. See Vol. 5, pp. 67–70. A *void* contract is, of course, incapable of ratification, since no promise can ever revive that which never had an existence. But the contracts of an infant which are merely *voidable* may be confirmed or ratified by

such infant after he becomes of age, without any new consideration. *Shropshire v. Burns*, 46 Ala. 108; *Chandler v. Simmons*, 97 Mass. 512; *Grant v. Beard*, 50 N. H. 129; *Henry v. Root*, 33 N. Y. (6 Tiff.) 526. And all that is necessary is that the infant, after attaining his majority, should expressly agree to ratify his contract by words, oral or in writing, or by acts which import a recognition and a confirmation of his promise. *Id.*; *Boody v. McKenney*, 23 Me. 517; *Proctor v. Sears*, 4 Allen, 95; *Dublin, etc., Railway v. Black*, 8 Exch. 181; *Mawson v. Blane*, 10 id. 206. But a ratification of an infant's contract should be something more than a mere *admission* to a stranger that such a contract existed; there should be a *promise* to a party in interest or to his agent, or at least an explicit admission of *an existing liability*, from which a promise is implied. *Goodsell v. Myers*, 3 Wend. 479; *Orvis v. Kimball*, 3 N. H. 314. See, also, *Thrupp v. Fielder*, 2 Esp. 628; *Wilcox v. Roath*, 12 Conn. 550; *Alexander v. Hutcheson*, 2 Hawks (No. Car.), 535; *Rowe v. Hopwood*, L. R., 4 Q. B. 1; *Tobey v. Wood*, 123 Mass. 88; 25 Am. Rep. 27. So, the promise must be made voluntarily and freely, and if obtained by fraud, or duress, or fear, it is void (*Harmer v. Killing*, 5 Esp. 102; *Brooke v. Gally*, 2 Atk. 34), and the promise must be that the infant himself will pay, and not that some other person will. *Mawson v. Blane*, 10 Exch. 206. The validity of a promise by an adult to pay a debt incurred by him during his minority, is not, however, affected by the fact that at the time of making the promise he believed himself legally liable to pay the debt (*Morse v. Wheeler*, 4 Allen, 570; *Ring v. Jamison*, 66 Mo. 424), or by the fact that during his minority his guardian kept him supplied with all necessaries. *Id.* But in some of the cases, it has been thought that the promise must be made with a knowledge on the part of the infant, that he is not legally liable upon his contract. See *Ordinary v. Wherry*, 1 Bailey (So. Car.), 28; *Hinely v. Margaritz*, 3 Penn. St. 428; *Norris v. Vance*, 3 Rich. (So. Car.) 164; *Petty v. Roberts*, 7 Bush (Ky.), 410.

If the contract be executed, any slight acknowledgment of liability or admission of the contract is deemed a sufficient ratification. *Cheshire v. Barrett*, 4 McCord (So. Car.), 241. Thus, where an infant took a deed of land, and executed at the same time a mortgage thereof for part of the purchase-money, and after coming of age conveyed the land with warranty, it was held that this was an affirmance of the whole transaction, and that the mortgage was a legal charge upon the land, in the hands of the purchasers. *Lynde v. Budd*, 2 Paige, 191; *Boston Bank v. Chamberlin*, 15 Mass. 220. See *Middleton v. Hoge*, 5 Bush (Ky.), 478. So, if an infant, after attaining his majority, redeliver his deed

made in infancy, it would be a ratification. *Davidson v. Young*, 38 Ill. 145. And mere acquiescence or silence affords a conclusive presumption of ratification, if it be susceptible of such an interpretation. *Lawson v. Lovejoy*, 8 Me. 405; *Goode v. Harrison*, 5 B. & Ald. 147; *Richardson v. Boright*, 9 Vt. 368. Thus, an infant, acquiescing in the settlement of boundaries, after he became of age, would be bound by it. *Brown v. Caldwell*, 10 Serg. & R. (Penn.) 114. And leases by a guardian which endure beyond the minority of the ward, are not void, but only voidable, and may be confirmed by his acceptance of rent accruing after he comes of age. *Smith v. Low*, 1 Atk. 489; *Story v. Johnson*, 2 Younge & Coll. Exch. 586; *Barnaby v. Barnaby*, 1 Pick. 224; *Huth v. Carondelet, etc., R. R. Co.*, 56 Mo. 202. So, a partition by an infant, even if unequal, is only voidable by him when he comes of age, and not void; and if he take the whole profits of the unequal part after his full age, the partition is made good forever (Co. Litt. 171 *b*; *Johnston v. Fournier*, 69 Penn. St. 449), and so, if he continues in possession of land received in exchange. *Id.* And in general, where an infant has purchased real estate, and has taken and continued in possession after becoming of full age, and has exercised acts of ownership over the same, he will be deemed to have ratified the contract of purchase. *Dana v. Coombs*, 6 Me. 89; *Cheshire v. Barrett*, 4 McCord (So. Car.), 241; *Henry v. Root*, 33 N. Y. (6 Tiff.) 526. So, if an infant buys goods on credit, and retains them for his own purposes, for an unreasonable time after he comes of age, without restoring them to the seller, or giving him notice of an intention to avoid the contract, it operates as a ratification of the contract, and renders the buyer liable in an action for the price of the goods. *Booly v. McKenney*, 23 Me. 517; *Aldrich v. Grimes*, 10 N. H. 194; *Boyden v. Boyden*, 9 Mete. 519; *Ludwig v. Stewart*, 32 Mich. 27, 30. What is a reasonable time for an infant, on coming of age, to elect to confirm or avoid acts done during minority, must be determined in view of the particular circumstances presented in the given case. *Thompson v. Strickland*, 52 Miss. 574.

Where, in a suit on a promissory note executed by the defendant before he became of age, his infancy was pleaded as a defense, and there was evidence tending to show that the note was given as a part of the consideration upon an agreement for the purchase of property, it was held that the plaintiff might prove a ratification of the note, by introducing the deed conveying the property to the defendant after he became of age, and also show that he afterward mortgaged the same property. *Montgomery v. Whitbeck*, 23 Minn. 172.

Declarations by an infant, after he becomes of age, of his intention

to pay a note, accompanied with his authorizing an agent to pay it, are held to be a sufficient confirmation to bind him, although the agent has done nothing in regard to the matter. *Orvis v. Kimball*, 3 N. H. 314. See, also, *Hunt v. Massey*, 3 Nev. & M. 109; S. C., 5 B. & Ad. 902.

It has been held that an executor or administrator may ratify the contract of his intestate made during his infancy, although the intestate died before he attained his majority; and such ratification will be obligatory, though it was verbally made, without any new consideration (*Jefford v. Ringgold*, 6 Ala. 544), and that any acts which will amount to ratification by an infant himself will amount to a ratification after his death by his administrator or executor. *Shropshire v. Burns*, 46 id. 108. But see *Counts v. Bates*, Harp. (So. Car.) 464.

§ 7. **What not a confirmation.** A voidable contract of an infant cannot, after his coming of age, be ratified by a mere acknowledgment of the debt. Such, at least, is the rule applicable to his *executory* contracts. *Dunlap v. Hales*, 2 Jones' (No. Car.) L. 381; *Conklin v. Ogborn*, 7 Ind. 553; *Bank of Silver Creek v. Browning*, 16 Abb. Pr. (N. Y.) 272. And see *ante*, p. 137, § 6. And where a debt contracted during infancy was paid in part by the infant after coming of age, it was held not to be a sufficient confirmation, although it was an explicit acknowledgment of indebtedness. *Thrupp v. Fielder*, 2 Esp. 628. See, also, *Robbins v. Eaton*, 10 N. H. 561. So where a defendant, in conversation concerning a note made by him during infancy, said he owed the plaintiff, but was unable to pay him, and that he would endeavor to procure his brother to be bound with him, this was held to be no ratification of his contract made during infancy. *Ford v. Phillips*, 1 Pick. 202. See, also, *Hoit v. Underhill*, 9 N. H. 436; *Bigelow v. Grannis*, 2 Hill, 120. And where an infant contracted a debt, which, after he had attained majority, he promised to pay "as fast as he got able," it was held that this promise availed nothing without proof of ability to pay. *Chandler v. Glover*, 32 Penn. St. 509. See *Thompson v. Lay*, 4 Pick. 47. And mere declarations, or a promise upon a contingency to make a deed of affirmance, will not ratify and confirm the deed of an infant. *Clamorgan v. Lane*, 9 Mo. 446. And see *Somes v. Brewer*, 2 Pick. 199; *Dearborn v. Eastman*, 4 N. H. 441; *Tucker v. Moreland*, 10 Pet. 75. But see *Wheaton v. East*, 5 Yerg. (Tenn.) 41.

If an infant gives us promissory note for the price of goods bought by him, and afterward assigns them to secure the payment of another debt, the retaining of the goods by the minor to sell for the assignee,

until he becomes of age, will not deprive him of the right to set up infancy in defense to the note. *Thing v. Libbey*, 16 Me. 55.

So where an infant purchases lands, and subsequently, but before his majority, sells the land, his retention of the proceeds of such sale after he comes of age is not such an affirmance of his contract, as to render valid against him an obligation given by him as a consideration for the land. *Walsh v. Powers*, 43 N. Y. (4 Hand) 23; S. C., 3 Am. Rep. 654. See *Weed v. Beebe*, 21 Vt. 495.

An infant cannot empower an agent or attorney to act for him (*Fonda v. Van Horne*, 15 Wend. 631; *Lawrence v. McArter*, 10 Ohio, 37; *Trueblood v. Trueblood*, 8 Ind. 195); and, therefore, an infant after arriving at full age, cannot give validity to the act of a person appointed by him during minority, as such, by ratifying it. *Id.*; *Armistage v. Widoe*, 36 Mich. 124. See *ante*, pp. 131, 135, §§ 2, 5.

The ground upon which the retention and use by a defendant, after he becomes of age, of property bought while he was an infant, are held to be an affirmance of the contract of purchase, is, that these acts show a promise or undertaking to perform it after his incapacity to make contracts is removed. See *ante*, p. 137, § 6. Where an action was brought to recover the price of goods sold to a firm, one member of which was an infant at the time of the sale, it appeared that the action was brought before the infant became of age, and that a portion of the goods sold were attached upon the writ among other goods; that the attached goods were sold at auction by consent of all parties, and were bid off by the grandfather and guardian of the infant; that the infant after becoming of age purchased the goods from his grandfather, and afterward used and sold them for his sole benefit. Upon this state of facts it was held that the jury would not be warranted in finding that the infant after he became of age intended to ratify the original contract. *Todd v. Clapp*, 118 Mass. 495.

A chattel mortgage, given by an infant to secure the payment of money borrowed for a business enterprise, is, so far as the right to enforce it by taking possession and making sale is concerned, only an executory contract, and, whether absolutely void or only voidable, cannot be made binding by any act of affirmance while the infancy continues. *Ludwig v. Stewart*, 32 Mich. 30.

§ 8. **Disaffirmance of contract.** An infant may, in general, not only refuse performance of his executory contracts during his infancy, but he may disaffirm them when he arrives at age, leaving the other party wholly without remedy. *Shipman v. Horton*, 17 Conn. 481; *Bedinger v. Wharton*, 27 Gratt. 857; *Heath v. West*, 26 N. H. 191; *Grace v. Hale*, 2 Humph. (Tenn.) 27; *Knox v. Flack*, 22 Penn. St.

337; 1 Story on Cont., § 104. And even where the contract is executed, he may ordinarily disaffirm it at any time, and may recover for what he has done or paid under it, provided he restore, or account for, what he has received under the contract. *Taft v. Pike*, 14 Vt. 405; *Judkins v. Walker*, 17 Me. 38; *Stout v. Merrill*, 35 Iowa, 47; *Bailey v. Barnberger*, 11 B. Monr. (Ky.) 113; *Carpenter v. Carpenter*, 45 Ind. 142; *Kilgore v. Jordan*, 17 Tex. 341; *Bartholomew v. Finne, more*, 17 Barb. 428; *Locke v. Smith*, 41 N. H. 346; *Heath v. Stevens*, 48 id. 251. Where the contract of the infant was executed before he became of age, and the nature of the case is such that he cannot restore in specie what he received under the contract, this does not prevent him from recovering what he paid, or for what he did, by allowing for the amount and value of what he received. *Id.* And it is held that an infant may avoid his assignment without tendering the consideration received. *Briggs v. McCabe*, 27 Ind. 327. It has likewise been held that, where the infant has consumed the consideration given for his deed of certain land, restitution of the amount cannot be required as a condition of his disaffirmance of his conveyance. *Green v. Green*, 7 Hun (N. Y.), 492; S. C. affirmed, 69 N. Y. (24 Sick.) 553; 25 Am. Rep. 233; *Miles v. Lingerman*, 24 Ind. 385. It is only when an infant, on disaffirming a contract, then still has the consideration, that he is compelled to return it. *Dill v. Bowen*, 54 Ind. 205. See, also, *Bartlett v. Drake*, 100 Mass. 176; *Walsh v. Young*, 110 id. 399; *Mustard v. Wohlford*, 15 Gratt. (Va.) 329; *Bedinger v. Wharton*, 27 id. 857. But see *Stuart v. Baker*, 17 Tex. 417; *Pursley v. Hays*, 17 Iowa, 311. But where a contract has been fully executed, and it appears that it was advantageous to the infant, and was entered into in good faith, the infant cannot disaffirm the contract, unless he can place the other party in *statu quo*. Thus, an infant, in consideration of an outfit to enable him to go to California, agreed, with the assent of his father, to give the party furnishing the outfit one-third of all the avails of his labor during his absence, which he afterward sent accordingly. The jury having found that the agreement was fairly made, and for a valuable consideration, and beneficial to the infant, it was held that he could not rescind the agreement and recover back the amount so sent, deducting the amount of the outfit and any other money expended for him by the other party in pursuance of the agreement. *Breed v. Judd*, 1 Gray, 455. So, it is held that money belonging to an infant, and received from him by his brother, with directions to use it for the support of their parents, if necessary, and so used by the brother before any revocation of the direction, cannot be recovered by the infant upon his coming of full

age. *Welch v. Welch*, 103 Mass. 562. See, also, *Weeks v. Leighton*, 5 N. H. 343; *Harney v. Owen*, 4 Blackf. (Ind.) 337.

An infant may disavow, in various ways, his intention of carrying into effect a contract made during infancy. See *ante*, p. 137, § 6. Any act clearly showing an intention so to do is sufficient. *Carr v. Clough*, 26 N. H. 280; *Walker v. Ellis*, 12 Ill. 470. Thus, he may enter upon lands sold and conveyed by him when under age (*McGill v. Woodward*, 3 Brev. [So. Car.] 401; *Voorhies v. Voorhies*, 24 Barb. 150); he may, when he comes of age, convey the same lands to another (*Id.*; *Prout v. Wiley*, 28 Mich. 164); or he may leave the service of one to whom he was bound, and enter the service of another. See *Gaffney v. Hayden*, 110 Mass. 137; 14 Am. Rep. 580; *Medbury v. Watrous*, 7 Hill, 110; *ante*, p. 140, § 7. So an infant, who had taken a deed of land, and given his note for the purchase-money, made an attempt to disaffirm the contract before his majority, and again within a few days thereafter; and, upon the refusal of the vendor to agree thereto, offered to give him a sum of money together with the improvements erected by himself on the land, by way of compromise. He then abandoned the premises, and left them in a position for the vendor to occupy at any time he saw fit, and it was held that the disaffirmance was sufficiently speedy and unequivocal to avoid the contract. *Baker v. Kennett*, 54 Mo. 82.

A deed or a contract for the sale of land executed by an infant is not absolutely void, but may be either affirmed or avoided at his pleasure, after he attains his majority. *Gillespie v. Bailey*, 12 W. Va. 70.

A mortgage of personal property executed by an infant is voidable at his election at any time before he comes of age, and within a reasonable time thereafter, and is avoided by any act which evinces that purpose. And it is held that an unconditional sale and delivery of the property to a third person is such an act. *Chapin v. Shafer*, 49 N. Y. (4 Sick.) 407; *Skinner v. Maxwell*, 66 N. C. 45; *State v. Plaisied*, 43 N. H. 413. And on the question as to the disaffirmance of a mortgage of land, executed by an infant, the execution by the infant, after her majority, of a warranty deed of the same land to a person other than the mortgagee, was held to be a sufficient disaffirmance. *Dixon v. Merritt*, 21 Minn. 196.

The doctrine has been asserted in some of the cases, that an infant is bound expressly to disaffirm his contract within a reasonable time after coming of age, and that, if he neglects to do so, his silence will operate as an affirmation of his contract. See *Dublin, etc., Railway Co. v. Black*, 8 Exch. 181; *Cork, etc., Railway Co. v. Cuzenove*, 10 Q. B. 935; *Ebbett's Case*, L. R., 5 Ch. App. 302; *In re Contract Corporation*, 7 id. 115; *Scott v. Buchanan*, 11 Humph. 474; *Richardson*

v. *Boright*, 9 Vt. 368; *Kline v. Beebe*, 6 Conn. 506; *Stucker v. Yoder*, 177; *ante*, p. 137, § 6. But upon the question of the affirmance of a deed executed during minority, by mere lapse of time, or, in other words, by mere silence or acquiescence for any particular period of time, after the minor has attained his majority, the great weight of authority, both English and American, is to the effect that such delay or acquiescence, without any affirmative act indicating an intention to affirm, or tending to mislead the grantee into a belief of such intention, or any circumstances of equitable estoppel, such as standing by and seeing improvements made or money expended, or a sale of the property to another, without asserting his claim, will not operate as an affirmance or confirmation of the deed executed during minority, nor prevent the minor from disaffirming it and reclaiming the land at any time allowed him by the statute of limitations for bringing an action. *Prout v. Wiley*, 28 Mich. 164; *Huth v. Carondelet, etc., Railway Co.*, 56 Mo. 202; *Highley v. Barron*, 49 Mo. 103; *Thomas v. Pullis*, 56 id. 211; *Boady v. McKenney*, 23 Me. 517; *Green v. Green*, 69 N. Y. (24 Sick.) 553; 25 Am. Rep. 233. And, in general, the better opinion would seem to be that mere inaction can never be construed into a ratification of the contract of a person's minority, unless, after arriving at full age, he shall be in possession, by virtue of such contract, of something valuable, the retention of which may properly be regarded as an election to appropriate the results of the contract to his own personal and pecuniary benefit. *N. H. Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345. And see *Irvine v. Irvine*, 9 Wall. 617; *ante*, p. 137, § 6.

The rule is well settled in Massachusetts, that where the consideration of the infant's contract has been lost during minority, he does not lose his right to avoid the contract without making restoration (*Bartlett v. Drake*, 100 Mass. 174; 1 Am. Rep. 101; *Bassett v. Brown*, 105 id. 551); but this rule does not apply to a settlement made by an infant partner in a firm, and the firm cannot maintain an action on the claim without first offering to restore what the infant received. *Brown v. Hartford Fire Ins. Co.*, 117 id. 479.

The contract of an infant may be disaffirmed or avoided by those only, besides himself, who are privy in blood or estate. *Nelson v. Eaton*, 1 Redf. (N. Y.) 498; *Bozeman v. Browning*, 31 Ark. 364.

A contract between a minor and his master, whereby the former paid his bounty money to the latter in consideration of his consent to the minor's enlistment, may, after the minor's decease, intestate, be rescinded by the administrator of his estate, and the money be recovered back. 59 Me. 103.

§ 9. **Infancy when no defense for torts.** An infant is liable for

a tort in the same manner as an adult. *Conway v. Reed*, 66 Mo. 346. Infancy cannot, therefore, be pleaded as a defense to actions founded in pure tort. Thus, it is no defense to a suit for damages occasioned by an assault and battery (*Peterson v. Haffner*, 59 Ind. 130); nor to an action of trover or trespass for the unlawful conversion of property. *Baxter v. Bush*, 29 Vt. 465; *Lewis v. Littlefield*, 15 Me. 233; *Homer v. Thwing*, 3 Pick. 492; *Walker v. Davis*, 1 Gray, 506. So, it has been held that, if an infant makes a purchase of goods, and procures their delivery by fraud, he will be liable as in tort. And the mere fact that he made the contract, and by fraudulent means obtained possession of the property, will not shield him from liability to suit, in case or in trover. *Mathews v. Cowan*, 59 Ill. 341. So, an infant bailee of a horse is held liable for positive, tortious, willful acts causing injury or death of the horse. *Burnard v. Haggis*, 14 C. B. (N. S.) 45; *Eaton v. Hill*, 50 N. H. 235; S. C., 9 Am. Rep. 189; *Towne v. Wiley*, 23 Vt. 355; *Campbell v. Stakes*, 2 Wend. 136. And it has been held that where the infant elects to settle such liability by giving his note, he will be liable in an action upon the note, to the same extent that he would be if the action had been brought upon the cause of action which formed the consideration for the note. *Ray v. Tubbs*, 50 Vt. 688. On the other hand, it is held that an infant is not bound by a note given in direct settlement of a tort. *Shaw v. Coffin*, 58 Me. 256; S. C., 4 Am. Rep. 290. In the same case, however, an infant is held liable in assumpsit for money stolen, and for the proceeds of property stolen by him, and converted into money. See, also, *Howe v. Clancey*, 53 Me. 130; *Walker v. Davis*, 1 Gray, 506; *Elwell v. Martin*, 32 Vt. 217.

A person may be liable for prosecuting, after he is of full age, a vexatious suit, commenced by him while an infant. *Sterling v. Adams*, 3 Day (Conn.), 411. But an infant is not liable for the malicious prosecution of a suit during his infancy, in his name, by his next friend, which was brought without his knowledge or authority, even if he expressly assented to the suit after he had knowledge of it. *Burnham v. Seaverns*, 101 Mass. 360.

And generally, the only tortious acts for which an infant can be made responsible are those committed by himself or under his immediate inspection and express direction, and not those committed by persons assuming to act under his implied authority. He cannot legally create an agent. *Robbins v. Mount*, 33 How. (N. Y.) 24; S. C., 4 Robt. 553.

§ 10. **When a defense for torts.** Where the substantive ground of the action is contract, as well as where the contract is stated as inducement to an alleged tort, infancy is held to be a good defense. *Wilt v.*

Welsh, 6 Watts (Penn.), 1; *Hewitt v. Warren*, 10 Hun (N. Y.), 560. The general rule is, that "the fraudulent act to charge the infant must be wholly tortious; and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge him in trover or case by a change of the form of action." 2 Kent's Com. 241. In an action for the price of goods sold and delivered to an infant, it was held that he could not be made liable by reason of fraudulent representations as to his credit. *Studwell v. Shapter*, 54 N. Y. (9 Sick.) 249. And see *Kobbe v. Price*, 14 Hun (N. Y.), 55. So, infancy is a good defense to an action on the case for deceit and false warranty in the sale of goods (*Prescott v. Norris*, 32 N. H. 101; *Morrill v. Aden*, 19 Vt. 505); or to an action on the case for false and fraudulent representations by a vendor or pledgor as to his ownership of property sold or pledged. *Doran v. Smith*, 49 Vt. 353. An action on the case for deceit in the sale of a horse cannot be sustained against an infant; nor would the fact that the deceit consisted of a concealment of the truth distinguish the case from one in which the falsehood was distinctly affirmed in words; nor would the plaintiff's cause of action derive any additional strength from the fact that he offered to return the horse and receive back the purchase-money. *Gilson v. Spear*, 38 Vt. 311. And see *Green v. Greenbank*, 2 Marsh. 485; 4 Eng. Com. L. 375; *Bartlett v. Wells*, 1 B. & Sm. 836; *Price v. Hewett*, 8 Exch. 146; *Liverpool, etc., Asso. v. Fairhurst*, 9 id. 422; *De Roo v. Foster*, 12 J. Scott (N. S.), 272. And although, as seen in the preceding section, an infant bailee is liable for positive tortious acts willfully committed, whereby the horse is injured or killed, yet, for a mere breach of contract, as a failure to drive the horse skillfully, the infant cannot be made liable by changing the form of action to tort. It is therefore held that, in an action on the case against an infant bailee for his positive tortious act by which the thing bailed is injured or destroyed, the character of the act should be stated in the declaration, in order that it may be seen to be such a tort as amounted to a disaffirmance of the contract of bailment. *Eaton v. Hill*, 50 N. H. 235; S. C., 9 Am. Rep. 189.

After considerable conflict on the point, it may now be deemed settled that a defendant is not estopped from setting up infancy as a defense to a contract, by his fraudulent representations that he was of full age, even if an action in tort for the deceit can be maintained. *Burley v. Russell*, 10 N. H. 184; *Prescott v. Norris*, 32 id. 101; *Merriam v. Cunningham*, 11 Cush. 40; *Brown v. McCune*, 5 Sandf. (N. Y.) 225; *Cannam v. Farmer*, 3 Exch. 698. But see *Kilgore v. Jordan*, 17 Tex. 341; *Keen v. Coleman*, 39 Penn. St. 299; *Eckstein v. Frank*, 1 Daly (N. Y.), 334; *Schunemann v. Paradise*, 46 How. (N. Y.) 426; *Word*

v. *Vance*, 1 Nott & Mc. (So. Car.) 197. The ground upon which the defense of infancy in such cases is allowed, is, that otherwise such persons would lose the protection which the law seeks to afford them during their disability. *Merriam v. Cunningham*, 11 Cush. 40; 1 Story on Cont., § 111.

§ 11. **Who may interpose defense.** The general rule is, that infancy is a personal privilege, and it can only be taken advantage of by the infant himself, or his personal representative. *Oliver v. Houdlet*, 13 Mass. 238; *Shropshire v. Burns*, 46 Ala. 108; *Dinsmore v. Webber*, 59 Me. 103.

In a suit upon a promissory note against the maker, the answer was that the consideration of the note was the compromise of a bastardy case, and that the mother, the payee, was an infant, and it was held that the maker could not avail himself of the minority of the payee, and there was no error in striking the allegation thereof from the answer. *Garner v. Cook*, 30 Ind. 331.

One who has contracted with infants to receive from them a conveyance which he knows must be executed by them before attaining their majority, cannot, after having availed himself of the benefits of the contract, plead their infancy in bar of an action on his promissory note given for the purchase-money. *Beeson v. Carlton*, 13 Ind. 354. So, if an infant execute a deed of bargain and sale of land, the execution of another deed of the same land, by the infant, after arriving at full age, to a third person, while the land is held adversely to the infant under the first deed, and without an entry by the infant for the purpose of avoiding the first deed, will not enable the second grantee to take advantage of the infancy to set aside the first deed. *Harrison v. Adcock*, 8 Ga. 68; *Harris v. Cannon*, 6 id. 382.

Where a note was signed by an infant as principal, and by an adult as surety, an injunction to restrain a suit upon the note, though granted as to the infant, was refused as to the surety. *Parker v. Baker*, 1 Clarke (N. Y.), 136. But if an infant purchase necessities, and give a promissory note signed by himself and a surety, and the surety afterward pays the note, he is entitled to recover the money, so paid, of the infant; and the cause of action arises when the surety pays the note. *Conn v. Coburn*, 7 N. H. 368.

§ 12. **How interposed.** An infant defendant must, in all cases, appear and defend by guardian. *Knapp v. Crosby*, 1 Mass. 479; *Alderman v. Tirrell*, 8 Johns. 418; *Comstock v. Carr*, 6 Wend. 526. The substantial object of this requirement of the law is, the protection of such persons against what the law adjudges to be their own incompetency to choose attorneys or to conduct their own litigation with

suitable prudence and discretion. *Boyle v. McAvoy*, 29 How. (N. Y.) 278. And an infant defendant cannot, while an infant, waive the defect that he did not appear by guardian (*Fairweather v. Satterly*, 7 Robt. [N. Y.] 546); and there is held to be no difference in this respect between an action brought on a contract made by an infant, and one brought for a tort committed by him. *Id.* See *Winston v. McLendon*, 43 Miss. 254; *Smart v. Haring*, 14 Hun (N. Y.), 276. And, in actions at law, the irregularity of the appearance and answer of an infant defendant by attorney, and of the trial and verdict upon the issue thus found, is an error of fact, for which a judgment would be reversed or set aside if entered. *Maynard v. Downer*, 13 Wend. 575; *Arnold v. Sanford*, 14 Johns. 417; *Bird v. Pegg*, 5 B. & Ald. 418; *Kellogg v. Klock*, 2 Code Rep. (N. Y.) 28; *Harvey v. Large*, 51 Barb. 222. It is now held in New York, that where an infant defendant in an action for foreclosure is served with process, but no guardian *ad litem* is appointed, and judgment is taken by default, the judgment is not void, but voidable; and, in such case, where judgment is obtained by fraud and collusion, an action may be maintained on the part of the infant to set it aside as to him. *McMurray v. McMurray*, 66 N. Y. (21 Sick.) 175; affirming S. C., 60 Barb. 117; 41 How. 41; 9 Abb. (N. S.) 315. And see *Ridgeley v. Crandall*, 4 Md. 435.

If the defendant be of full age at the time he appears and pleads his infancy, he may, of course, appear and plead by attorney. And it is held that where a defendant has, by his *laches*, deprived himself of any legal right to set up the defense of infancy to avoid his contract, the court will not aid him by setting aside a judgment for the purpose, regularly entered against him by default. *Graham v. Pinckney*, 7 Robt. (N. Y.) 147; *Howard v. Dusenbury*, 44 How. (N. Y.) 423. And where a judgment was rendered against an infant, who appeared by attorney, and he, though knowing of its existence, and how it was obtained, took no steps to avoid it until six years after he attained age, such delay amounts to *laches*, so as to deprive him of the right to set the judgment aside for irregularity. *Kemp v. Cook*, 18 Md. 130.

Infancy must be pleaded specially. *Roe v. Angevine*, 7 Hun, 679; 1 Chitty's Pl. 503. And see *Bryant v. Pottinger*, 6 Bush (Ky.), 473; *Treadwell v. Bruder*, 3 E. D. Smith (N. Y.), 597; *Voorhies v. Voorhies*, 24 Barb. 150. But in some jurisdictions it is held that infancy may be given in evidence under the general issue in assumpsit. *Kimball v. Lamson*, 2 Vt. 138; *Thrall v. Wright*, 38 id. 494; *Cutts v. Gordon*, 13 Me. 474; *Dacosta v. Davis*, 4 Zab. (N. J.) 319. If, to a plea of infancy, the plaintiff reply denying the infancy, it is incumbent on the defendant to prove his infancy. *Borthwick v. Carruthers*, 1

Term R. 648. This may be done by calling persons who can speak to the time of his birth; or by declarations on the subject, made by deceased members of his family. Roscoe on Ev. (11th ed.) 392; 2 Chitty on Cont. (11th Am. ed.) 1292. But an entry in a parish register of baptisms, as to the time of the birth of a child, is not evidence of its age. *Rex v. Clapham*, 4 Carr. & P. 29; *Wiher v. Law*, 3 Stark. 63. In an action upon a promissory note, the defendant, in order to establish his defense of infancy, offered in evidence a passport, containing a statement of his age, alleged to have been delivered to him on his emigration from Germany. But it was held to have been properly rejected, on the ground that, although an official document, it was made up from the statements of the defendant himself, or some person in his behalf, and is not by any statute made evidence of the correctness of its contents. He also offered a book called a family record, shown to be in the handwriting of his father, then living in Germany, containing the births of his several sons, and it was held that, as the book was not a public record, and as the father was still living, it was properly rejected. *Kobbe v. Price*, 14 Hun (N. Y.), 55.

An adult cannot plead in abatement the infancy of a co-defendant. *Hallam v. Mumford*, 1 Root (Conn.), 58; *Hartness v. Thompson*, 5 Johns. 160.

CHAPTER XXXIV.

INSANITY.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition and nature. It is a familiar principle of the law of contracts that in order to make a contract binding upon the parties thereto, both must assent to it, with an intelligent understanding of its terms. This, of course, requires that they shall be of sound mind, for the mental imbecility of a party at the time of entering into a contract will preclude a just apprehension on his part of its terms, and an intelligent assent to them by him. And if either party is not of sound mind, the obligations of a contract do not arise. But the law presumes the sanity of every one, and his consequent power to bind himself by contract, in the absence of proof to the contrary, that being the actual condition of a majority of mankind. Every person is, therefore, justified in dealing with others as being of sound mind, until he has some notice of their insanity, or some evidence to put him upon inquiry. But every one is bound to take notice that a person is insane, after he has been found to be so by inquisition for that purpose, and placed under guardianship.

Sanity and intellectual capacity being the rule, with comparatively few exceptions, the presumption must prevail until rebutted, that all acts performed by adult persons are binding, and the evidence to overcome this presumption must be clear and satisfactory. *McCarty v. Kearnan*, 86 Ill. 291, 295.

The terms *non compos mentis* are used as a general name, applicable to all persons of unsound mind. Co. Litt., 246 b, 247 a; *Doud v. Hall*, 8 Allen, 410; *Jackson v. King*, 4 Cow. 207; *Odell v. Buck*, 21 Wend. 142; *Maddox v. Simmons*, 31 Ga. 512; *Burnham v. Mitchell*, 34 Wis. 117. It, therefore, includes idiots as well as lunatics. An idiot, in the common acceptation of the term, is a natural fool, "who hath had no understanding from his nativity, and who is, therefore, presumed by law to be never likely to attain any." Chitty on Cont.,

135. A person may, however, become as devoid of understanding by accident or sickness as one who was born to that condition. Idiocy is not a mere weakness of mind, but a deficiency thereof; not necessarily entire, but such as to render the person affected with it incapable of understanding and acting in the ordinary affairs of life, or in the particular contract as to which the question arises.

A lunatic, on the other hand, is one who has understanding, but, by disease, grief or other accident, has lost the use of his reason. The term "insanity" covers every degree of unsoundness of mind and derangement of intellect, short of idiocy. The only test of legal insanity, as affecting capacity to make a will, is held to be delusion, hallucination, a belief of facts which no rational person would believe. *In Matter of Forman*, 54 Barb. 274; 1 Tuck. 205.

It is difficult precisely to define insanity, or to discriminate between it and mere weakness of mind, or disturbed imagination. Sanity itself is susceptible of division into degrees, and absolute sanity may or may not be predicated of any person, according as we include therein more or less perfect power of thought or accuracy of judgment. Insanity upon some one or more subjects may co-exist, with apparently perfect sanity on all others. It is frequently also of an intermittent character, periods of insanity being followed by lucid intervals, in which the person affected seems to enjoy his senses as perfectly as those who have never been insane.

Habitual unsoundness, once shown to exist, will be presumed to continue until the contrary is established. *State v. Reddick*, 7 Kans. 143; *Carpenter v. Carpenter*, 8 Bush (Ky.), 283. But there is no presumption that a temporary hallucination continues, since that would necessarily conflict with and overcome the superior presumption of sanity. *Hall v. Unger*, 2 Abb. [U. S.] 507; *Staples v. Wellington*, 58 Me. 453. The effect of these presumptions is to cast the burden of proof of insanity, in the first instance, upon the party asserting it, but proof that it has previously existed in a permanent form has the effect to change the rule, and require the other party to prove that the contract sought to be established was made during a lucid interval. And, for that purpose, he must show that the party sought to be charged had memory and judgment enough to understand the character of his act, and the legal responsibility flowing therefrom. *Atty.-Gen v. Parnther*, 3 Bro. Ch. 443; *Noel v. Kurper*, 53 Penn. St. 97; *Goodell v. Harrington*, 3 Thomp. & C. 345; *Hicks v. Marshall*, 8 Hun, 327.

The way usually provided by law for establishing the insanity of a person is by inquisition for that purpose, and a finding of the fact of his insanity is followed by the appointment of a guardian. Such a

finding is, however, only *prima facie* evidence of insanity, except as between the parties immediately concerned and their privies, but is capable of being overcome by proof. *Lancaster Co. Bank v. Moore*, 78 Penn. St. 407; 21 Am. Rep. 24; *Hoyt v. Adeo*, 3 Lans. 173; *Searles v. Harvey*, 6 Hun, 658. One who has been duly adjudged insane, and placed under guardianship, but who has afterward, and before being offered as a witness, been duly adjudged sane, and released from guardianship, is a competent witness in a cause. *Sarbach v. Jones*, 20 Kans. 497. It is for the jury to judge of the credit that is to be given to his testimony. *Ib.*

A person who contracts with an insane person is estopped from alleging his want of capacity. *Allen v. Berryhill*, 27 Iowa, 534; 1 Am. Rep. 309.

Intoxication to such an extent as to deprive a contracting party of the use of his reason has, in many cases, been treated as a temporary insanity, having the same effect upon a contract entered into during its continuance as if arising from any other cause. *Gore v. Gibson*, 13 M. & W. 623; *Matthews v. Baster*, L. R., 8 Exch. 132; 4 Eng. Rep. 502; *Pitt v. Smith*, 3 Camp. 33; *Miller v. Finley*, 26 Mich. 249; 12 Am. Rep. 306.

§ 2. **When a defense in an action on contract.** A lunatic is, in the eye of the law, as incapable of contracting as if he were naturally dead. In this respect the plea of insanity differs from that of infancy. An infant not being mentally incapacitated may affirm; but a confirmed lunatic can never be bound by an act done during the operation of his malady. A contract must, in general, be obligatory upon both parties, or it will bind neither. *Kingston v. Phelps*, Peake, 227; *Biddell v. Dowse*, 6 B. & C. 255; *Ferrer v. Owen*, 7 id. 427; *Marsh v. Wood*, 9 id. 659.

Mutual promises, to be binding, must be concurrent and obligatory upon both parties at the same time. *Livingston v. Rogers*, 1 Caines, 583; *Tucker v. Woods*, 12 Johns. 190; *Keep v. Goodrich*, id. 397. The rule, founded upon these general principles, that if one of the parties to a contract is legally incapable of giving his assent by reason of his mental unsoundness, there cannot be a valid contract founded upon his assent, carried to its logical conclusion, would relieve the sane party as well as the lunatic, but the cases on the subject do not go to that extent. The courts have usually afforded protection to the insane party only, as is done in the case of infants.

It was formerly held that a man should not be allowed to stultify himself by pleading his own incapacity, but, in the interests of justice, that rule has long since been repudiated. Although a person of un-

sound mind may, under some circumstances, incur a legal liability, as will hereafter appear, yet, as a general rule, his contracts are either voidable or wholly void, and he may defend against them on that ground.

As to those which are voidable by him, it makes no difference whether they are beneficial or not. *Maddox v. Simmons*, 31 Ga. 512; *Cook v. Parker*, 5 Phil. (Penn.) 265; *Crowther v. Rowlandson*, 27 Cal. 376. One who was incompetent to contract, by reason of unsoundness of mind or deprivation of reason, at the time he attempted to do so, may generally repudiate his contract when he becomes sane, even though his insanity was temporary and produced by his own act; unless, indeed, he became so purposely with intent to defraud the other party, or has in some way ratified such contract. 1 Pars. on Cont. 385. In case he does so repudiate his contract, the law gives him an affirmative remedy, by action to recover back that which the other party has received upon the contract. *Rice v. Peet*, 15 Johns. 503. The legal representatives of the payee of a note, who, when insane, made a settlement with the maker, and delivered up the note to be canceled, may repudiate such settlement, and sue upon such note, and recover the amount, less the value of property received thereon which cannot be restored. *Burnham v. Mitchell*, 34 Wis. 117. But his insanity is also a good defense to an action against him on the contract itself, and either he, or his guardian, or his legal representatives, may plead it as such. The facts that he seemed at the time to be sane, and that the party dealing with him did not know he was insane, will not necessarily make the contract binding upon him so as to preclude that defense. *McCrillis v. Bartlett*, 8 N. H. 569. Much more is the defendant's unsoundness of mind a good defense, if the plaintiff's knowledge of it be shown, as that raises a presumption of fraud on his part. *Molton v. Camroux*, 2 Exch. 487; 10 id. 183. And if the circumstances were such as to put the sane party upon inquiry as to the mental condition of the other, and the latter was in fact a lunatic, he cannot recover even for money advanced or services rendered to such lunatic under the contract. *Lincoln v. Buckmaster*, 32 Vt. 652; *In Matter of Beckwith*, 3 Hun, 443; 6 N. Y. S. C. (T. & C.) 13.

The fact that the parties to a contract which has been partly executed cannot be placed in *statu quo*, may be sufficient to prevent the allowance of a claim to rescind on the part of the party who was insane; but, where the contract remains wholly executory, the courts will not enforce it against one shown to have been of unsound mind when he made it. *Wilder v. Weakley*, 34 Ind. 181; *Musselman v. Cravens*, 47 Ind. 1.

If a principal becomes insane after conferring authority upon an agent to act for him, that authority is thereby revoked, and contracts subsequently made by the agent cannot be enforced against the principal, except where the power was coupled with an interest, or where a consideration of value was given by a third person dealing with the agent, in reliance upon his authority and in ignorance of the principal's incapacity. *Davis v. Lane*, 10 N. H. 156; *Matthiessen v. McMahon*, 38 N. J. Law, 536; *Bunce v. Gallagher*, 5 Blatchf. C. C. 481.

It is a good defense to a note that the maker was in such a condition of mind as to render him incapable of self protection against imposition. *Johnson v. Chadwell*, 8 Humph. 145. The note of one known to the payee to be insane or imbecile at the time it was given, and obtained from him by fraud or imposition, is absolutely void as against the maker; and that defense may be set up even against an innocent indorsee. *Sentance v. Poole*, 3 C. & P. 1; 14 Eng. C. L. 419. And the insanity of the indorser of a note is a good defense to an action against him by the indorsee. *Alcock v. Alcock*, 3 Man. & G. 268; *Peaslee v. Robbins*, 3 Metc. 164; *Burke v. Allen*, 9 Fost. 106.

Generally a lunatic is not liable on an account stated, or upon specialties. *Tarbut v. Bispham*, 2 M. & W. 6.

The deed of a lunatic is at least voidable, and may be avoided by himself, or by one to whom he conveys after the recovery of sanity, or by his heirs, by setting up that defense in an action arising thereon. *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236; *Cates v. Woodson*, 2 Dana, 452. Such a deed has been held absolutely void, where the grantor was totally and positively incompetent at the time he executed it, although no fraud was alleged, and his incompetency had not previously been judicially determined. *Van Deusen v. Sweet*, 51 N. Y. (6 Sick.) 378.

A mortgage given by a lunatic after inquisition found is voidable, if not void, whether the mortgagee had or had not knowledge of his unsoundness of mind at the time of its execution. *Mohr v. Tulip*, 40 Wis. 66. The deed of a lunatic, except before an inquisitor and finding of lunacy, if taken in good faith, is voidable only, and not void. *Eaton v. Eaton*, 37 N. J. 108; 18 Am. Rep. 716.

As a general rule, the contracts of a lunatic are held to be void if made after the period when he is found, by inquisition, to have become insane, and all made after inquisition and the appointment of a guardian are void. *Atty.-Gen. v. Parkhurst*, 1 Ch. Cas. 112; *Fitzhugh v. Wilcox*, 12 Barb. 235; *Wadsworth v. Sherman*, 14 id. 169. This includes all gifts of goods and chattels by an idiot, lunatic or drunkard, and all his bonds or other contracts, made after an actual

finding by inquisition for that purpose, of his incompetency, and before he is permitted by the court to assume again the control of his property; and their invalidity, for that reason, may be set up as a defense in actions thereon. The fact that a person has been adjudged lunatic or insane, and is under the ban of the law when a note is given by him, is a legal defense to an action on such note, and the defense should be made in a court of law, and not in a court of equity by way of injunction to restrain the collection of a judgment rendered on such note in a court of law. *McCormick v. Littler*, 85 Ill. 62.

The special protection afforded to insane persons by courts of equity has been sufficiently noticed under the title Equity, Vol. 3, p. 143.

§ 3. **When not a defense on contract.** Absolute soundness of mind is not necessary to enable a person to make a valid contract or conveyance. It is sufficient if his mind fully or reasonably comprehends the import of the particular transaction in which he is engaged. *Hovey v. Hobson*, 55 Me. 256; *Miller v. Craig*, 36 Ill. 109; *Speers v. Sewell*, 4 Bush (Ky.), 239; *Dennett v. Dennett*, 44 N. H. 531; *Rippy v. Ganot*, 4 Ired. Eq. 443. Proof of delusions on independent subjects is not enough to render the contract void. *Lozear v. Shields*, 23 N. J. Eq. 509.

If the insanity of a person is permanent and general, he is totally incapacitated from contracting, either for himself or for another. But if it is merely intermittent, or is confined to one subject or class of subjects, so that the mind can act with perfect sanity on others, or has lucid intervals, his incapacity is limited to those subjects in respect to which he is insane, and to the time during which he is in that condition. *Hall v. Warren*, 9 Ves. Jr. 605. A contract made during a lucid interval is valid, although insanity may have immediately preceded and may immediately follow it. *Lilly v. Waggoner*, 27 Ill. 395; *Jones v. Perkins*, 5 B. Monr. 222. But it should clearly appear that his mind was then in full possession of its sane powers, and not in the slightest measure affected by lunacy. *Atty.-Gen. v. Parnther*, 3 Bro. Ch. 443.

A contract fairly made with a lunatic, for necessities furnished him, or things suitable to his condition and habits in life, will be sustained, and his lunacy will be no defense to an action therefor. *McCormick v. Littler*, 85 Ill. 62; *Richardson v. Strong*, 13 Ired. 106; *Ex parte Northington*, 1 Ala. Sel. Cas. 400; *Skidmore v. Romaine*, 2 Bradf. 122; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658; *Baxter v. Earl of Portsmouth*, 2 C. & P. 178; *Dane v. Kirkwall*, 8 id. 679; *McCrillis v. Bartlett*, 8 N. H. 569. And this is so, even though such necessities were furnished to him and his family after inquisition found. *Matter*

of *Beckwith*, 3 Hun (N. Y.), 443. And his estate will be liable therefor after his death. *Shafer v. Wing*, 2 Hun (N. Y.), 671; *La Rue v. Gilkyson*, 4 Penn. St. 375. The note of an insane person, given for necessities, if not valid as a note, is at least evidence of the value on a *quantum meruit*. 1 Pars. on Bills, 149.

Insanity is no defense to an action for work done under the direction of the lunatic, if the plaintiff was not aware of his condition. *Brown v. Jodrell*, 3 C. & P. 30; M. & M. 105. Nor is it a defense to a contract made by a person in good faith, and for a full consideration paid, and without knowledge of the insanity of the other party, or such information as would lead a prudent person to a belief of his incapacity. *In Matter of Beckwith*, 3 Hun, 443; 6 N. Y. S. C. (T. & C.) 13; *Eaton v. Eaton*, 8 Vroom, 108; 18 Am. Rep. 716; *Yauger v. Skinner*, 1 McCarter, 389; *Matthiessen, etc. v. McMahon*, 38 N. J. Law, 536; *Beavan v. McDonnell*, 9 Exch. 309; *Elliot v. Ince*, 7 De G. M. & G. 475. Thus, an executed contract, such as one by a merchant for the purchase of goods, made before the day from which the inquest found him to be *non compos*, cannot be avoided by proof of his insanity at the time of the purchase, unless the vendor had knowledge of his condition, or committed a fraud upon him. *Beals v. See*, 10 Penn. St. 56; *Nace v. Boyer*, 30 id. 99; *State Bank v. McCoy*, 69 Penn. St. 204; 8 Am. Rep. 246. Nor is insanity a defense to a note given by an insane man and procured to be discounted at a bank for his benefit, the bank having no notice of his incapacity, though he is found by inquisition to have been insane from a time anterior to the making of such note. *Lancaster Co. Bank v. Moore*, 78 Penn. St. 407; 21 Am. Rep. 24. And generally an executed contract, fairly made, with one who was apparently of sound mind and not known to be otherwise, and of which he has received the benefit, cannot be avoided by him or his legal representatives, if the other party cannot be restored to his original position. *Molton v. Camroux*, 2 Exch. 487; 4 id. 17; *Wilder v. Weakley*, 34 Ind. 181; *Lincoln v. Buckmaster*, 32 Vt. 658; 1 Pars. on Cont. 386, and notes.

The insanity of a party to a contract subsequent to the time of making it can in no wise affect the rights of other parties. *Owen v. Davies*, 1 Ves. Sen. 82.

A court of equity will award reasonable compensation to one who contracts with a lunatic, or renders him important and beneficial services in ignorance of his lunacy (*Ballard v. McKenna*, 4 Rich. [So. Car.] Eq. 358); but it will not rescind a contract fairly made with such lunatic, by a person having no notice of his lunacy. *Carr v. Holliday*,

1 Dev. & Bat. Eq. 344; *Sergeson v. Sealey*, 2 Atk. 412; *Faulder v. Silk*, 3 Camp. 126; *Den v. Clark*, 5 Halst. 217.

§ 4. **When a defense for torts.** A tort is a private or civil wrong or injury, done by one party to the person or property of another. An intent to injure is not, in general, essential to constitute the injurious act a tort; the law looking rather to the loss or damage of the party suffering, than to the intent of the actor. *Auburn, etc., v. Douglass*, 12 Barb. 557. A lunatic may therefore commit a tort, whether he has sufficient sense or reason to understand the nature of his act, and to form a purpose to injure the other party or not.

The general rule is that lunatics are liable civilly for all torts or wrongs committed by them. But there is one exception to this rule, which is, that a lunatic is not liable for slanderous words uttered by him while totally deranged. *Bryant v. Jackson*, 6 Humph. 199. The reason of this exception would seem to be that malice, or an intent to injure, is essential to constitute the form of wrong; and a lunatic may perhaps be presumed incapable of intelligently forming such an intent or purpose. Perhaps, too, the presumed inability of the words of an insane man to produce any injury to the person spoken against may be deemed to render it non-actionable, as being an injury without a loss.

Insanity when the words complained of were spoken may, therefore, be set up as a defense to an action of slander; and it may also be shown by evidence under a plea of the general issue, either in excuse or in mitigation of damages. *Yeates v. Reed*, 4 Blackf. 463. But such insanity must be established by direct proof, and not by mere reputation. In order to prove that it existed when the words were spoken, evidence is admissible to show that it existed for some months before and after that time, but no further. *Dickinson v. Barber*, 9 Mass. 225; *Horner v. Marshall*, 5 Mumf. 466.

§ 5. **When not a defense for torts.** The general rule, that the person who does an illegal or mischievous act, which is likely to prove injurious to others, is answerable for the consequences which may directly or naturally result from his conduct, though he may have had no intent to do the particular injury which followed, is applicable as well to lunatics as to those who are sane.

The inability of a lunatic to form an evil design, if existing, does not therefore in the least affect his responsibility for any tort or wrong committed by him to which such a design or intent is not essential; and there seems to be no other ground for holding insanity a defense in such cases. And the cases uniformly hold that, with the exception stated in section 4, his insanity at the time of committing an injury will not avail a party as a defense to a civil action therefor, whether the

action be in trespass or trover, or for negligence. *Weaver v. Ward*, Hob. 134; *Cross v. Andrews*, Cro. Eliz. 622; *Cross v. Kent*, 32 Md. 581; *Krom v. Schoonmaker*, 3 Barb. 649; *Williams v. Cameron*, 26 Barb. 172; *Hartfield v. Roper*, 21 Wend. 615; *Morse v. Crawford*, 17 Vt. 499.

§ 6. **Ratification of contracts.** A contract which is merely voidable, and not absolutely void, must necessarily be capable of ratification. Such a contract by an insane man, voidable because of his mental incapacity, may therefore be ratified by him when he regains his reason. It is even doubted by an eminent writer whether the rule, that contracts of a lunatic made after office found are absolutely void, would be enforced so far as to hold that they could not be ratified and confirmed by him after his sanity was restored. 1 Pars. on Bills, etc., 151. But few decisions are to be found upon this question, but by analogy to the law respecting the ratification of contracts by infants, it is probable that such words and acts of an adult as would ratify contracts made by him during minority would be held equally efficient in the case of a person once insane who has recovered his reason. His neglect to interpose the defense to an action upon a contract made when he was insane ought, it would seem, to estop him from afterward setting it up in any way. See *ante*, pp. 152, 155, §§ 2, 3.

In respect to deeds of persons *non compotes mentis*, it has been held that they may be ratified and established after the grantor is restored to reason; but what shall be deemed such a ratification is far from being settled. In different cases, his acquiescence in the possession by the grantee of the premises conveyed, for four, six and nine years, without objection, has been held sufficient for that purpose; but, in other cases, a mere silent acquiescence for any time short of the period of limitation has been held not to operate as a ratification. *Wallace v. Lewis*, 4 Harr. (Del.) 75; *Emmons v. Murray*, 16 N. H. 385; *Robbins v. Eaton*, 10 id. 561; *Jackson v. Carpenter*, 11 Johns. 539. If a person restored to sanity accepts the consideration for which he had made a deed while insane, and does so intelligently, that will operate as a ratification. *Bond v. Bond*, 7 Allen, 1.

§ 7. **Of idiocy as a defense.** If there is such a deficiency of intelligence as to render a person incapable of understanding and acting in the ordinary affairs of life, or in the particular contract, his idiocy will annul his contract. *Ball v. Mannon*, 3 Bligh (N. S.), 1. It is held to be sufficient to invalidate any contract if the party contracting did not at the time understand what he was about.

Idiocy is, therefore, a good defense to a bond or other specialty (*Yates v. Boen*, Stra. 1104; 2 Bla. Com. 291, 292; *Faulder v. Silk*,

3 Camp. 126; *Sergeson v. Sealey*, 2 Atk. 412); and this defense may be interposed by a husband in avoidance of his wife's deed, made before coverture. *Millison v. Nicholson*, Cam. & Nor. 499.

And yet, an idiot is liable for actual necessities, such as board, or supplies furnished to him as a housekeeper. *Speers v. Sewell*, 4 Bush (Ky.), 239; *Manby v. Scott*, 1 Sid. 112.

CHAPTER XXXV.

INSOLVENT DISCHARGE.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition and nature. Insolvency is an inability to pay debts. In this country the term "bankruptcy" is frequently used to signify the same thing; and bankrupt and insolvent laws are classed together. They are, indeed, complementary to each other, and differ principally in that the former act to a certain extent compulsorily, while the latter do not. The object of both classes of laws is to insure a ratable division of the assets of the unfortunate debtor, and to secure to him afterward immunity, in greater or less degree, from further molestation on account of previous debts. 3 Pars. on Cont. 431.

Bankrupt laws have existed in England since the year 1543. In the United States three general bankrupt laws have been enacted, viz.: In 1800, 1841 and 1867, but all have been repealed. State insolvent laws have been at different times enacted, and still exist, in all or nearly all of the States; and they have been held not to infringe the constitutional provision against impairing the obligations of contracts, because they act upon the remedy and not upon the contracts themselves. *Sturges v. Crowninshield*, 4 Wheat. 122. Such laws have, in some cases, been held to enter into and become a part of contracts made while they were in existence. *Ogden v. Saunders*, 12 Wheat. 213. It has also been held that State laws may constitutionally provide for a full discharge of contracts made within their jurisdiction, and between their own citizens. *Walsh v. Farrand*, 13 Mass. 19; *Babcock v. Weston*, 1 Gall. 168; *Smith v. Smith*, 2 Johns. 241; *Smith v. Parsons*, 1 Ohio, 236. They cannot, however, affect contracts made prior to their enactment. *Farmers & Mechanics' Bank v. Smith*, 6 Wheat. 131. How far the laws of a State can operate outside of its own limits will be considered hereafter.

It is now settled that the United States and the several States have a concurrent power to enact such laws; but an act of congress on the subject, when enacted, is paramount, and supersedes and suspends the

operation of State laws on the same subject, as to cases within its purview. *In Matter of Reynolds*, 8 R. I. 485; 5 Am. Rep. 615; *Martin v. Berry*, 37 Cal. 208; *Fisk v. Montgomery*, 21 La. Ann. 446; 3 Pars. on Cont. 446. And a discharge under a State law, in proceedings commenced after the enactment of a law by congress, will be inoperative. *Shears v. Solhinger*, 10 Abb. (N. S.) 287. Some cases hold that jurisdiction may still be exercised under a State law, at least until proceedings have been instituted under the United States law. *Reed v. Taylor*, 32 Iowa, 209; 7 Am. Rep. 180, 183, note; *Sedgwick v. Place*, 1 Bankr. Reg. 204; *Clark v. Biningjer*, 9 Am. L. Reg. (N. S.) 304. But the weight of authority seems to be against that position. *Matter of Reynolds*, 8 R. I. 485; 5 Am. Rep. 615.

§ 2. **When a defense.** Both bankrupt and insolvent laws usually provide for a final discharge of the insolvent from all previous debts which are provable under them, except in cases of fraud or breach of fiduciary obligation. The effect of a final discharge under the United States bankrupt acts is to absolutely release the bankrupt from all liability arising upon prior contracts which could be so proved, with those exceptions. It is good in all parts of the country, and furnishes a good defense to all actions against the bankrupt for debts and liabilities incurred by him prior to filing the petition, unless within those exceptions, or shown to be invalid as provided in the acts themselves. *Stern v. Nussbaum*, 47 How. Pr. 489. It is conclusive upon the State courts, and cannot be there impeached for any cause which would have prevented its being granted or authorized it to be annulled. *Ocean Nat. Bank v. Olcott*, 46 N. Y. (1 Sick.) 12; *Corey v. Ripley*, 57 Me. 69; 2 Am. Rep. 19. Even the failure of the bankrupt to name a particular creditor in his schedule of debts, or to give him notice of the proceedings, will not avoid the discharge as to such creditor, unless, indeed, such omission was fraudulent. *Thomas v. Jones*, 39 Wis. 124; *Payne v. Able*, 7 Bush (Ky.), 344; 3 Am. Rep. 316; *Symonds v. Barnes*, 59 Me. 191; 8 Am. Rep. 418; *Burpee v. Sparhawk*, 103 Mass. 111; 11 Am. Rep. 320; *Batchelder v. Low*, 43 Vt. 662; 5 Am. Rep. 311.

A discharge in bankruptcy is a good defense to a creditor's bill, founded on a judgment obtained before the discharge, to enforce it as a lien upon land bought with money of the bankrupt and conveyed to his wife (*Ocean Nat. Bank v. Olcott*, 46 N. Y. [1 Sick.] 12); or to a judgment rendered on a contract induced by fraud (*Palmer v. Preston*, 45 Vt. 154; *Shuman v. Strauss*, 34 N. Y. Supr. 6); or to a judgment on a debt, which itself, as a simple debt, would not be barred thereby (*Hubbell v. Flint*, 15 Gray, 550); or to a judgment on con-

tract, obtained against the bankrupt after the commencement of the bankruptcy proceedings. *Monroe v. Upton*, 50 N. Y. (5 Sick.) 593. It will also avail as such in an action on a contract, entered into by the bankrupt, on surrendering leased premises, to pay any deficiency of rent caused thereby. *Matter of Swift*, 44 How. Pr. 247.

A discharge in bankruptcy releases the bankrupt from a contingent liability, such as that of surety on a guardian's bond. *Jones v. Knox*, 46 Ala. 53; 7 Am. Rep. 583. It furnishes a good defense to the sureties of a bankrupt on a bond not directly for the payment of the principal's debt, such as one for the return to an officer of property attached by him (*Payne v. Able*, 7 Bush [Ky.], 344; 3 Am. Rep. 316); or the official bond of a constable (*McMinn v. Allen*, 67 N. C. 131); or that of a collector. *United States v. Throckmorton*, 8 Bankr. Reg. 309. See *Saunders v. Best*, 17 C. B. (N. S.) 731.

All creditors who assent to a discharge in bankruptcy by participating in the proceedings are barred thereby. *Clay v. Smith*, 3 Pet. 411.

A discharge under a State insolvent law is a good defense, to the full extent declared by that law, wherever it is operative, against any claim arising upon a contract within its purview. Where the obligation discharged was the consideration of a continuing contract, as in case of a premium note given to a mutual insurance company, its discharge is a defense to an action on the latter contract. *Reynolds v. Mut. Fire Ins. Co.*, 34 Md. 280; 6 Am. Rep. 337.

The discharge under a State insolvent law of a debt arising on a contract, made and to be performed in that State, between parties residing there, is good everywhere, and furnishes a good defense to an action for such debt. Wharton's Conf. of Laws, § 523. Especially is this so, where the creditor has come in under the proceedings (*Matter of Coates*, 3 Abb. Ct. App. 231; *Matter of Bonaffe*, 23 N. Y. [9 Smith] 169; *Quelin v. Morsson*, 1 Knapp's P. C. C. 266; *Jones v. Horsey*, 4 Md. 306); or where the creditor had notice of the proceedings, even though he did not prove his debt. *Wetherbee v. Martin*, 82 Mass. (16 Gray) 518.

Whether such a discharge will be a good defense to an action by a creditor residing in a different State is a point upon which the decisions are very conflicting. Judge PARSONS thinks the weight of authority to be in the affirmative, where the contract is on its face to be performed within the State granting the discharge. 3 Pars. on Cont. 439, note *w*. The Massachusetts courts have held a discharge under the insolvent laws of that State, existing at the time the contract was made, an effectual bar to a suit there by a creditor who was

at that time a citizen of the State, but had become a resident of another State before suit brought. *Stoddard v. Harrington*, 100 Mass. 87; 1 Am. Rep. 92; *Brigham v. Henderson*, 1 Cush. 430; *Converse v. Bradley*, id. 434, n. They have also held the discharge, under the English bankrupt act, of a merchant residing in that country, from a debt due to a Massachusetts creditor, which was contracted and payable in England, a bar to a subsequent action thereon in Massachusetts, whether the creditor proved his debt under the bankruptcy or not. *May v. Breed*, 7 Cush. 15.

It appears that in England, France and Holland, and perhaps other countries of Europe, discharges in bankruptcy granted under the laws of either country are held operative in the others.

§ 3. **When not a defense.** The effect to be given to a discharge under the insolvent law of one State as a defense to an action brought in the courts of another State, by a resident of such State, or on a contract to be performed there, has been considered under title Domicile, Vol. 2, p. 649. The general rule there laid down, that State insolvent laws can have no extra-territorial operation, and a discharge under the law of one State cannot affect a contract made or to be performed in another State, nor a debt due to a resident of another State, unless the creditor has in some way become a party to the proceeding, is supported by numerous authorities, a few of which will suffice here. *Judd v. Porter*, 7 Greenl. 337; *Springer v. Foster*, 2 Story, 387; *Felch v. Bugbee*, 48 Me. 9; *Baldwin v. Hale*, 1 Wall. 223; *Gilman v. Lockwood*, 4 id. 409; *Cook v. Moffat*, 5 How. (U. S.) 295; *Woodhull v. Wagner*, Baldw. 296; *Riston v. Content*, 4 Wash. C. C. 476; *Soule v. Chase*, 39 N. Y. (12 Tiff.) 342; *Pratt v. Chase*, 44 N. Y. (5 Hand) 597; 4 Am. Rep. 718; *Hawley v. Hunt*, 27 Iowa, 303; 1 Am. Rep. 273. In the latter case, Judge DILLON reasons, that a bankruptcy proceeding is in the nature of a judicial investigation, and jurisdiction of the creditor is necessary to make the discharge binding upon him, because the debt due him, no matter where it originated, attends his person; and he lays it down as settled law, that a non-resident, non-assenting creditor, is not bound by the debtor's discharge under State insolvent law. See, also, *Munroe v. Guilleaume*, 3 Abb. Ct. App. 334; *Braynard v. Marshall*, 8 Pick. 196; *Agnew v. Platt*, 15 id. 417; *Bradford v. Farrand*, 13 Mass. 18; *Easterly v. Goodwin*, 35 Conn. 279; *Urton v. Hunter*, 2 W. Va. 83; *Green v. Sarmiento*, 3 Wash. C. C. 17; *Boyle v. Zacharie*, 6 Pet. 635; *Suydam v. Broadnax*, 14 id. 67; *Stevenson v. King*, 2 Cliff. 1; *McMillan v. McNeill*, 4 Wheat. 209; *Emory v. Greenough*, 3 Dall. 369.

It is a general rule that a discharge only operates against claims which

were provable as debts under the bankruptcy or insolvency proceedings. *Houston v. State*, 34 Tex. 542; *Pierce v. Wilcox*, 40 Ind. 70. It is not, therefore, a defense to an action on a continuing contract for the enjoyment of its benefits subsequent to the filing of the petition. *Robinson v. Pesant*, 53 N. Y. (8 Sick.) 419; *Matter of May*, 47 How. 37.

The discharge of a debtor against whom judgment has been recovered since the institution of the bankruptcy proceedings, in a suit previously commenced, is not a bar to an action on such judgment, though it is provable in such proceedings; the failure of the defendant to obtain a continuance so as to plead it being a waiver of that defense. *Bradford v. Rice*, 102 Mass. 472; 3 Am. Rep. 483.

It is no defense to a surety in a bond by which he is bound, on some contingency, to pay his principal's debt, such as one to secure the payment of damages and costs in an injunction case (*Eastman v. Hibbard*, 54 N. H. 504; 20 Am. Rep. 157); or one to release property from an attachment levied more than four months before the bankruptcy proceedings (*Holyoke v. Adams*, 1 Hun, 223); or a bail bond (*Claflin v. Cogan*, 48 N. H. 411), that his principal has been discharged in bankruptcy after breach.

A discharge of one of several partners or joint debtors is no defense to an action against the others thereon. *Matter of Levy*, 2 Ben. 169; *Payne v. Able*, 7 Bush (Ky.), 344; 3 Am. Rep. 316.

Even though the terms of the law be sufficient to cover it, a debt due to the United States is not barred by a discharge. *United States v. Herron*, 20 Wall. 251.

A legal lien upon property, secured before the bankruptcy proceedings, is not affected by the discharge, and that cannot be set up to prevent the enforcement of such lien. *Jones v. Lellyett*, 39 Ga. 64; *State v. Recorder of Mortgages*, 21 La. Ann. 401; *Barstow v. Hansen*, 2 Hun, 333. The discharge of a mortgagor is no defense to an action to foreclose his mortgage, but it will bar a judgment against him for a deficiency. *Roberts v. Wood*, 38 Wis. 60.

Neither debts contracted by the bankrupt by means of fraud, or with a fraudulent intent, nor judgments on such debts, are barred by a discharge in bankruptcy, as they come within the express exceptions of the U. S. bankrupt act (*In re Wright*, 36 How. Pr. 167; *In re Robinson*, id. 176; *In re Patterson*, 2 Ben. 155; *Stewart v. Emerson*, 8 Bankr. Reg. 462); and the same is true as to debts arising from defalcation as a public officer, or while acting in a fiduciary capacity, even when they are included in the schedule and the discharge is general. *Stow v. Parks*, 1 Chand. (Wis.) 60; 2 Pin. 122. This latter exception has been held not to apply to the failure of an administratrix, intrusted with bills as collat-

eral to a debt due the estate, to dispose of and apply the proceeds as directed (*Cronan v. Cotting*, 104 Mass. 245; 6 Am. Rep. 232); or to the failure of an agent to account for and pay over monthly to his principal moneys collected by him, as agreed. *Grover and Baker v. Clinton*, 8 Nat. Bankr. Reg. 312. But it does apply to the case of an agent who converts to his own use moneys intrusted to him solely for the purpose of being invested by him on bond and mortgage (*Flagg v. Ely*, 1 Edm. [N. Y.] 206); and to that of an attorney who fails to pay over money collected for his client. *Heffren v. Jayne*, 39 Ind. 463; 13 Am. Rep. 281; *Flanagan v. Pearson*, 42 Tex. 1; 19 Am. Rep. 40. But see *Wolcott v. Hodge*, 15 Gray (Mass.), 547. An auctioneer, who receives money for goods sold by him, also acts in a fiduciary capacity, and his discharge is no bar to a suit therefor. *Jones v. Russell*, 44 Ga. 460. The obligation of a bank, receiving money from its customers in the ordinary course of business, is not fiduciary. *In re Bank of Madison*, 9 Bankr. Reg. 184. Commission merchants and factors act in a fiduciary capacity, and claims against them for the proceeds of goods sold by them, which they have converted to their own use or not paid over on demand, are not barred by a discharge in bankruptcy. *Gay v. Faran*, 2 Cin. (O.) 426; *Banning v. Bleakley*, 27 La. Ann. 257; 21 Am. Rep. 554; *Lemcke v. Booth*, 47 Mo. 387; *In Matter of Seymour*, 6 Int. Rev. 60; *In re Kimball*, 6 Blatchf. 292. Nor is a debt for defalcation as a guardian affected by such a discharge, and hence the right of his surety to sue the guardian for re-imbursement of moneys paid as such surety is not barred thereby. *Halliburton v. Carter*, 10 Bankr. Reg. 357.

§ 4. **New promise.** By analogy to the bar of the statute of limitations, a discharge in bankruptcy or insolvency protects the debtor only when he claims its protection. He may revive an obligation barred by his discharge by means of a new promise, made after the filing of the petition in bankruptcy, and either before or after his discharge. *Hornthal v. McRae*, 67 No. Car. 21; *Fraley v. Kelly*, id. 78; *Chabot v. Tucker*, 39 Cal. 434; *Dusenbury v. Hoyt*, 53 N. Y. (8 Sick.) 521; 13 Am. Rep. 543. To have that effect, the new promise must be distinct, specific, unambiguous, certain, and satisfactorily proved. *Stern v. Nussbaum*, 47 How. Pr. 489. If the promise is conditional, satisfaction of the condition must be shown. *Apperson v. Stewart*, 27 Ark. 619. A letter in which the discharged debtor says, "Be satisfied, all will be right; I intend to pay all my just debts; all will be right betwixt me and my creditors," is not sufficient to revive a discharged debt. *Allen v. Ferguson*, 18 Wall. 1.

Although the new promise is the real ground of action, and may be

so declared on, yet, *it seems*, the old debt may still be treated as the cause of action for the purpose of the remedy, and the new promise as a waiver of the bar. *Chabot v. Tucker*, 39 Cal. 434; *Dusenbury v. Hoyt*, 53 N. Y. (8 Sick.) 521; 13 Am. Rep. 543.

§ 5. **Defense, how interposed.** A discharge in bankruptcy will not avail as a defense unless pleaded. *Jenks v. Opp*, 43 Ind. 108; *Rudge v. Rundle*, 1 Thomp. & C. (N. Y.) 649. And a neglect to plead it, although arising from ignorance of the law, will not be aided by the court. *Ackerman v. Van Houten*, 5 Halst. 332. It must be pleaded specially. *Cross v. Hobson*, 2 Caines, 102. A plea of a discharge under a State insolvent act must state the facts showing the jurisdiction of the court or judge by whom it was granted. *Morgan v. Dyer*, 10 Johns. 161; *Wyman v. Mitchell*, 1 Cow. 316.

A discharge received during the pendency of a suit against the insolvent may be taken advantage of by plea *puis darrein continuance*, or supplemental answer. *Merchants' Bank v. Moore*, 2 Johns. 294; *Morgan v. Dyer*, 9 id. 255. Thus, if received during the pendency of a creditor's bill to enforce a claim which has been proved in bankruptcy it may be interposed in that suit by supplemental answer, whether the plaintiffs have proved their whole claim without disclosing or referring to the lien or not. *Stewart v. Isidor*, 5 Abb. (N. S.) 68; *Lyon v. Isett*, 42 How. Pr. 155; 11 Abb. (N. S.) 353. If obtained too late to be pleaded originally or by amendment, the defendant's remedy is by motion for a perpetual stay of execution. *Cornell v. Dakin*, 38 N. Y. (11 Tiff.) 253; *World Co. v. Brooks*, 7 Abb. (N. S.) 212.

CHAPTER XXXVI.

INTOXICATION.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition and nature. Intoxication is the condition of a man whose mind is affected by the immediate use of intoxicating drinks. 1 Bouv. Law Dict. 510, tit. Drunkenness.

This condition presents various degrees of intensity, ranging from a simple exhilaration to a state of utter unconsciousness and insensibility. In the earlier stages it frequently happens that the mind is not only not disturbed, but acts with extraordinary clearness, promptitude and vigor. In the latter the thoughts obviously succeed one another without much relevance or coherence, the perceptive faculties are active, but the impressions are misconceived, as if they passed through a distorting medium, and the reflective powers cease to act with any degree of efficiency. Some of the intermediate stages may be easily recognized, but it is not always possible to fix upon the exact moment when they succeed one another. In some persons peculiarly constituted, a fit of intoxication presents few if any of these successive stages, and the mind rapidly loses its self-control, and for the time is actually frenzied, as if in a maniacal paroxysm, though the amount of the drink may be comparatively small. The same phenomenon is observed sometimes in persons who have had some injury of the head, who are deprived of their reason by the slightest indulgence.

The habitual use of intoxicating drinks is usually followed by a pathological condition of the brain, which is manifested by a degree of intellectual obtuseness, and some insensibility to moral distinctions once readily discerned. The mind is more exposed to the force of foreign influences, and more readily induced to regard things in the light to which others have directed them. In others it produces a permanent mental derangement, which, if the person continues to indulge, is easily mistaken by common observers for the immediate effects of hard drinking. These two results—the mediate and the immediate effects of drinking—may co-exist; but it is no less necessary to distin-

guish them from each other, because their legal consequences may be very different. Moved by the latter a person goes into the street and abuses or assaults his neighbors; moved by the former the same person makes his will, and cuts off those who have the strongest claim upon his bounty, with a shilling. In a judicial investigation, one class of witnesses will attribute all his extravagances to drink, while another will see nothing in them but the effect of insanity. The medical jurist should not be misled by either party, but be able to refer each particular act to its proper source. Esquirol's *Mal. Men.* ii. 73; Marc de la Folie, ii. 605; Ray's *Med. Jur.* 497; Macnish's *Anatomy of Drunkenness*, chap. 14; 1 *Bouv. Law Dict.* 510, 511.

§ 2. **When a defense on contracts.** The common law shows but little disposition to afford relief, either in civil or criminal cases, from the immediate effects of drunkenness. It does not usually consider mere drunkenness as a sufficient reason for invalidating any act (*Pickett v. Sutter*, 5 Cal. 412; *Johnson v. Rockwell*, 12 Ind. 76; *Reynolds v. Dechaums*, 24 Tex. 174); nor does a court of equity (*Shaw v. Thackray*, 17 Jur. 1045; 1 Sm. & G. 537; *Lightfoot v. Heron*, 3 Y. & C. 586); where a party to a contract is voluntarily intoxicated at the time of making it, to the extent only that he does not clearly understand the business, this does not render his contract void or voidable, where no advantage is gained by dealing with him. *Henry v. Ritenour*, 31 Ind. 136. And see *Cory v. Cory*, 1 Ves. Ch. 19; *Cooke v. Clayworth*, 18 Ves. 12; *Crane v. Conklin*, Saxton, 346; *Birdsong v. Birdsong*, 2 Head (Tenn.), 289. To render a transaction voidable on account of drunkenness of a party to it, it should appear that he was so drunk as to have drowned reason, memory, and judgment, and impaired his mental faculties to an extent that would render him *non compos mentis* for the time being. This is so especially when the other parties connected with the transaction have not aided in or procured his drunkenness. *Bates v. Ball*, 72 Ill. 108; *Johns v. Fritchey*, 39 Md. 258. If the intoxication be sufficient thus to deprive him of understanding, it is a defense, whether voluntary or caused by the procurement of the other party. *Mansfield v. Watson*, 2 Clarke (Iowa), 111; *Barrett v. Buxton*, 2 Aik. (Vt.) 167; *Burroughs v. Richman*, 1 Green (N. J. Law), 233; *Lee v. Ware*, 1 Hill (So. Car.), 313; *Foot v. Tewksbury*, 2 Vt. 97; *Taylor v. Patrick*, 1 Bibb, 168; *Cummings v. Henry*, 10 Ind. 109; *Hawkins v. Bone*, 4 F. & F. 311. And if a man has become incapable, from a continued course of previous intoxication, of judging upon the propriety of his acts, a court of equity will carefully examine the contract, to see whether it does not contain evidence that advantage was taken of his habits. *Conant v. Jackson*, 16 Vt.

335 ; *Birdsong v. Birdsong*, 2 Head (Tenn.), 289. So a contract, unreasonable in itself, entered into by an habitual drunkard, when in a state of excitement, from excessive drinking, almost amounting to madness, with a person who at the time held him in a complete subjection, will be set aside in equity. It is not necessary in such a case to establish actual madness. *Wiltshire v. Marshall*, 14 W. R. 602 ; 14 L. T. (N. S.) 396. One reduced to such extreme debility by intoxication as to be unable to rise, or sit up in bed unless supported, or to hold a pen and make a mark unless the pen and hand are held for him, can no more execute a conveyance of his property than if intoxicated. *Wilson v. Bigger*, 7 Watts & Serg. 111. And where a party to a contract, not so drunk as to be legally incompetent, is yet partly drunk, especially if led to drink by the other, the contract may be set aside in equity for fraud, since a less degree of vigilance would be required in such a case, the sober person knowing that the two did not at the moment stand on equal ground. *Mansfield v. Watson*, 2 Clarke (Iowa), 111. See *White v. Cox*, 3 Hay. 79. So a lease obtained by fraud and imposition from a person who was intoxicated is void. *Butler v. Mulinhill*, 1 Bligh, 137. A deed made by a person while in a state of gross intoxication will be set aside, if advantage has been taken of his situation, or his drunkenness was produced by the act or connivance of the person to be benefited by the deed. *O'Conner v. Kempt*, 29 N. J. Eq. 156. But to render the deed void, it must appear that, at the time of its execution, the grantor was so greatly under the influence of liquor as to be incapable of knowing the effect of what he was doing. *Shackelton v. Sebrée*, 86 Ill. 616. An agreement made by a person in a state of complete intoxication has been held to be void. *Pitt v. Smith*, 3 Camp. 33 ; *Seymour v. Delancy*, 3 Cow. 445 ; *Harbison v. Lemon*, 3 Blackf. 51 ; *Drummond v. Hopper*, 4 Harr. (Del.) 327. And drunkenness in such a degree as to render the testator unconscious of what he is about, or less capable of resisting the influence of others, avoids a will. *Shelford on Lun.* 274, 304. But see *post*, p. 171, § 4.

A publican cannot recover for beer furnished to third persons, by the order of an individual who has previously become intoxicated by drinking in his house. *Brandon v. Old*, 3 C. & P. 440.

To an action by an indorsee against the indorser of a bill, a plea, that when he indorsed the bill he was so intoxicated, and thereby so entirely deprived of sense, understanding and the use of his reason as to be unable to comprehend the meaning, nature or effect of the indorsement, or to contract — of which the plaintiff at the time of the indorsement had notice — is a good answer. *Gore v. Gibson*, 13 M. & W. 623 ; 9 Jur. 140 ; 14 L. J. Exch. 151. The doctrine of this

case is qualified by holding that the contract is voidable, not void, in *Matthews v. Baxter*, L. R., 8 Exch. 132; 4 Eng. 502. See *post*, p. 171, § 4.

Where a party attempts to invalidate a contract on the ground that the person executing it was intoxicated at the time, or for fraud, imposition or undue influence upon him, the burden of proof is upon the party impeaching the contract; but direct and positive proof is not required. *Conant v. Jackson*, 16 Vt. 335. So, where a plaintiff seeks to avoid a settlement, set up to defeat his recovery, on the ground that he was drunk at the time of making it, and induced thereto by threats to arrest him upon a charge which proves groundless, evidence is admissible that he had been drunk during a greater part of the time for some weeks previous to the settlement, while staying at the defendant's house, and with his knowledge. *Foss v. Hildreth*, 10 Allen (Mass.), 76. So, evidence of the party's condition several hours after the settlement may be given, as tending to show his condition when the settlement was made. *Phelan v. Gardner*, 43 Cal. 306.

In cases, both civil and criminal, where malice is an ingredient of the charge, it seems that simple intoxication may be given in evidence to rebut it; but this principle does not seem to be extended to the ingredient of intention. *Dawson v. State*, 16 Ind. 428. But see *People v. Rogers*, 18 N. Y. (4 Smith) 9.

§ 3. **When not a defense.** See preceding section. Although a person's mental faculties may be so far prostrated by long continued habits of intoxication as to render him for a considerable part of the time incompetent to make a contract, yet contracts made by him at intervals, when he appears sober and rational, cannot be avoided on the ground of imbecility alone, unless so unreasonable and unequal as to afford evidence that his appearance was deceptive, and his intellect really clouded and confused. *Conant v. Jackson*, 16 Vt. 335.

An agreement, if reasonable, and to settle family disputes, no unfair advantage being taken, will not be set aside because the party was drunk, or paternal authority exercised. *Cory v. Cory*, 1 Ves. 19.

Where the maker of a promissory note was not so intoxicated at the time he made the note but that he remembered the act and the accompanying circumstances, the next morning, it was held that he could not set up, as a defense, in an action on the note by a *bona fide* holder, the plea of intoxication. *Caulkins v. Fry*, 35 Conn. 170. The drunkenness of the maker of a promissory note is not a defense to an action brought thereon by a holder in good faith, in the absence of proof of fraud, or of his total incapacity. *Miller v. Finley*, 26 Mich. 249; 12 Am. Rep. 306. The drunkenness of the maker of a negotiable note

cannot be set up as a defense against an innocent holder for value, and the indorsee is deemed an innocent holder unless he took it *mala fide*, and with notice of the condition of the maker. *State Bank v. McKoy*, 69 Penn. St. 204; 8 Am. Rep. 246, 251, note.

A man may not make use of his intoxication as a means of cheating others. If he made himself drunk with the intention of avoiding a contract entered into by him while in that state, it may well be doubted whether he would be permitted to carry this fraud into effect. 1 Pars. on Contracts, 374, 375.

A man of weak intellect from habitual drunkenness, and incapable of managing his own affairs, may make a contract for necessities, including such things as are useful and proper for his station. *Darby v. Cabanne*, 1 Mo. App. 126. He may make a contract with an attorney to have a guardian appointed, under the statute, for his protection, and will be liable for the services rendered, and the costs and expenses. *Id.*

§ 4. **Ratification.** The intoxication of a person at the time of his execution of a contract does not render the contract void, but only voidable; and to defend against a contract on that ground, it must have been rescinded by restoring whatever was received as the consideration thereof. *Joest v. Williams*, 42 Ind. 565; 13 Am. Rep. 377, 381, note. If one buys goods while drunk, but keeps them when sober, his drunkenness is no answer to an action for the purchase-money. *Gore v. Gibson*, 13 M. & W. 623; 1 Pars. on Cont. 375. The fact, that a man possessed of reason and the power of reflection, is frequently and even daily intoxicated, is not sufficient to invalidate a clear and explicit contract, deliberately made by him, on the best terms, and obtained after some effort, with a person who is not proved to have taken advantage of a period of intoxication, which he subsequently declares to be satisfactory, and which is fully executed by the other party. *Reinicker v. Smith*, 2 Har. & J. 421.

A contract made when one of the persons to it is so drunk as to be incapable of transacting business or knowing what he is about is not void, but voidable only, and may be enforced against him, if ratified after he becomes sober; and this, though his condition was known to the other party to the contract at the time of making it. *Matthews v. Baxter*, L. R., 8 Exch. 132; 4 Eng. 502; *Molton v. Camroux*, 2 Exch. 487; 4 id. 17; 13 M. & W. 623; 42 L. J. Exch. 73; 28 L. T. (N. S.) 169; qualifying *Gore v. Gibson*, 13 M. & W. 623. So long as the grantor in a deed acquiesces in it, it cannot be impeached by third persons on the ground that it was executed by him when drunk. *Eaton v. Perry*, 29 Mo. (8 Jones) 96.

It is a defense in a suit upon a mortgage that the defendant was so

intoxicated at the time of signing the same as to be incapable of executing it ; and it is not controverted by an allegation in reply that defendant kept and used the goods for which the instrument was given, the claim being upon the written instrument and not for goods sold. It is necessary to show a ratification of the instrument by defendant when sober and in his right mind. *Reinskopf v. Rogge*, 37 Ind. 207.

§ 5. **Who may interpose the defense.** The personal representatives of a party to a contract may avoid it on the ground that he was drunk when he executed it, although such drunkenness was not occasioned by the procurement of the other party to the contract. *Wigglesworth v. Steers*, 1 Hen. & M. 70. They have the same rights that the party himself would have had. So, too, a deed obtained from the plaintiff's ancestor while he was intoxicated may be set aside. *Prentice v. Achorn*, 2 Paige's Ch. (N. Y.) 30

A defendant was refused leave to plead to an action for liquors and suppers furnished in a brothel, that he was deprived of understanding by intoxication when he made the contract sued on, as the plaintiff well knew, and that the articles were furnished to increase his intoxication, and that he derived no benefit from them. *Hamilton v. Grainger*, 5 Hurl. & Norm. 40. But it would seem that whether the party was too drunk to contract is a question for the jury. *Reynolds v. Dechaums*, 24 Texas, 174 ; *Cummings v. Henry*, 10 Ind. 109.

CHAPTER XXXVII.

JUDICIAL PROCEEDINGS.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition and nature. Judicial proceedings are proceedings relating to, practiced in, or proceeding from a court of justice. 1 Bouv. Law Dict. 767.

The mistake or default of a judge will not be allowed to prejudice the rights of the parties litigant. *Widner v. Walsh*, 3 Colo. 418; *Broom's Leg. Max.* 122.

Conclusive presumptions are made in favor of judicial proceedings. Thus it is an undoubted rule of pleading that nothing shall be intended to be out of the jurisdiction of a superior court but that which is so expressly alleged. *Peacock v. Bell*, 1 Saund. 74; *Gosset v. Howard*, 10 Q. B. 411, 455, 459. So, also, it is presumed, with respect to such writs as are actually issued by the superior courts at Westminster, that they are duly issued, and in a case in which the courts have jurisdiction unless the contrary appears on the face of them; and all such writs will of themselves, and without any further allegation, protect all officers and others in their aid acting under them; and this, too, although they are on the face of them irregular, or even void in form. 6 Coke, 54 *a*; *Gosset v. Howard*, 10 Q. B. 411, 455, 459.

The rule is well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry. And this extends not merely to regular courts of justice, but to all inquiries before magistrates, referees, municipal, military, and ecclesiastical bodies; and they are only restrained by this rule, viz.: That they shall be made in good faith to courts or tribunals having jurisdiction of the subject, and power to hear and decide the matter of complaint or accusation, and that they are not resorted to as a cloak for private malice. The question, therefore, in such cases is, not whether they are actionable in themselves,

but whether they were spoken in the course of judicial proceedings, and whether they were relevant and pertinent to the cause or subject of inquiry. Heard on Lib. & S., §§ 101, 102. The rule that no action will lie for words spoken or written in the course of any judicial proceeding has been acted upon from the earliest times. In *Cutler v. Dixon*, 4 Coke, 14 *b*, it was adjudged that if one exhibit articles to justices of the peace, "in this case the parties shall not have, for any matter contained in such articles, any action upon the case, for they have pursued the ordinary course of justice in such cases; and if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain, for fear of infinite vexation." And it has been decided that though an affidavit made in a judicial proceeding is false, slanderous, and malicious, no action will lie against the party making it. *Revis v. Smith*, 18 C. B. 126; *Henderson v. Broomhead*, 4 Hurlst. & N. (Exch.) 568.

The general rule is subject to this qualification, that in all cases where the object or occasion of the words or writing is redress for an alleged wrong, or a proceeding in a tribunal or before some individual or associated body of men, such tribunal, individual, or body must be vested with authority to render judgment or make a decision in the case, or to entertain the proceedings in order to give them the protection of privileged communications. This qualification of the rule runs through all the cases where the question is involved Heard on Lib. & S., § 104. And see 1 Bouv. Law Dict. 767.

§ 2. **When a defense for a judge.** If an action is brought against a judge of record, for an act done in his judicial capacity, a plea that he so did it will be a sufficient justification. *Mostyn v. Fabrigas*, Cowp. 172; *Briggs v. Wardwell*, 10 Mass. 356; *Gault v. Wallis*, 53 Ga. 675. Vol. 1, p. 147; Vol. 5, pp. 30, 38, 39. Judges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. *Bradley v. Fisher*, 13 Wall. 335; *Fray v. Blackburn* (*Knt.*), 3 B. & S. 576; *Ward v. Freeman*, 2 Ir. C. L. 460; *Kemp v. Neville*, 10 C. B. (N. S.) 523; 31 L. J. C. P. 158; 7 Jur. (N. S.) 913; 10 W. R. 6; 4 L. T. (N. S.) 640. And this rule of exemption from liability for erroneous judicial acts applies to inferior as well as to superior tribunals. *Londegan v. Hammer*, 30 Iowa, 508; *Fausler v. Parsons*, 6 W. Va. 486; 20 Am. Rep. 431. But the jurisdiction, if not of record, must affirmatively appear on the face of the proceedings. *Wall v. Trumbull*, 16 Mich. 228. In Tennessee the true rule is said to be that a judge is personally responsible to the injured party only for errors committed

in the arbitrary, corrupt and malicious exercise of an assumed judicial authority, without regard to the question of his jurisdiction. *Cope v. Ramsey*, 2 Heisk. (Tenn.) 197. It is well settled that an action will not lie against a judge for acting judicially, *but without jurisdiction* unless he knew, or had the means of knowing, of the defect of jurisdiction, and it lies upon the plaintiff in every such case to prove that fact. *Calder v. Halket*, 3 Moore's P. C. C. 28. And see *Bradley v. Fisher*, 13 Wall. 335. But a judge of a court of record is answerable for an act done by his command when he has no jurisdiction and is not misinformed as to the facts on which jurisdiction depends. *Houlden v. Smith*, 14 Q. B. 841; 14 Jur. 598; 19 L. J. Q. B. 170. So an action lies against a judge of an ecclesiastical court who has acted beyond the jurisdiction of the court, as where a party was excommunicated for refusing to obey an order of the ecclesiastical court, which it had no authority to make, or where the party had not been previously served with a citation or monition, nor had due notice of the order. *Beaurain v. Scott*, 3 Camp. 388.

A warrant granted by the chief justice of the queen's bench in chambers, returnable into that court, to arrest a party for a breach of the peace, is such a judicial act as will protect him against an action for false imprisonment. *Taafe v. Downes*, 3 Moore's P. C. C. 36 n.

§ 3. **When not a defense.** See preceding section. If a magistrate proceed unlawfully in issuing process, he, and not the executive officer, is liable. But the law does not invoke the aid of courts to punish the officers of justice for trifling errors in drawing up legal process. *Taylor v. Alexander*, 6 Ham. 144.

A judge of a superior court or of a court of general jurisdiction is not liable for a judicial act in a matter within his jurisdiction, although the act is in excess thereof; and the complaint alleges the act to have been done wrongfully and willfully. *Lange v. Benedict*, 73 N. Y. (28 Sick.) 12; 8 Hun, 362.

The judge of a county court is liable to a ward for misfeasance, in the clerk's defective execution of the guardian's bond. In this class of duties the clerk is responsible only in case of a refusal to discharge them when requested by the judge, or for fraud in collusion with the judge. *Kinnison v. Carpenter*, 9 Bush (Ky.), 599. So a probate judge is responsible for the illegal issue of a marriage license to a minor, although the license was issued without his knowledge by a clerk in his office, who had never qualified as deputy, but who was authorized by him to issue licenses generally. *Wood v. Farnell*, 50 Ala. 546. In a *qui tam* action against such judge therefor, the defend-

ant cannot be allowed to prove that after the issue of the license, but before the celebration of the marriage, and in ample time to prevent it, the plaintiff, who was the father of the minor, was informed of the issue of the license and promised to prevent the marriage, but made no effort to do so. *Id.*

§ 4. **When a defense to a ministerial officer.** See generally *ante*, Vol. 5, pp. 29, 35, 38 and 39. Where duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is *not* violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. And the same rule obtains when judicial functions are cast upon a ministerial officer. But to render a judge acting in a ministerial capacity, or a ministerial officer acting in a judicial capacity liable, it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of willfulness, corruption and malice. *Pike v. Megoun*, 44 Mo. 491; *Lilienthal v. Campbell*, 22 La. Ann. 600; *Walker v. Hallock*, 32 Ind. 239.

A ministerial officer is protected in the execution of process, valid on its face, issued by a court or magistrate having jurisdiction of the subject-matter to which it relates. *McLean v. Cook*, 23 Wis. 364; *Hicks v. Dorn*, 1 Lans. (N. Y.) 81; S. C., 54 Barb. 172; 42 N. Y. (3 Hand) 47; 9 Abb. (N. S.) 47; *Pierson v. Gale*, 8 Vt. 512; *Lattin v. Smith*, Breese, 361; *Nichols v. Thomas*, 4 Mass. 232. And if the process be void for want of jurisdiction in issuing it, he may refuse to execute it, and in a suit for neglect of duty he may show such want of jurisdiction in defense. *Portland Bank v. Stubbs*, 6 Mass. 422; *Savacool v. Boughton*, 5 Wend. 170; *Davis v. Wilson*, 65 Ill. 525. But an officer, if he act under process apparently valid but actually void, may avail himself thereof for defense but not for aggression. See above authorities. Where, therefore, an officer who, by virtue of a process valid upon its face but void for want of jurisdiction in the court issuing it, has levied upon and taken possession of property, brings an action to recover the property against another officer, who, by virtue of process against the owner, apparently valid, has taken it from plaintiff's possession, the character of such possession is a subject of inquiry and attack, and the invalidity of the process under which the plaintiff acted may be shown, but defendant's process protects him, and its validity cannot be assailed. *Clearwater, Jr., v. Brill*, 63 N. Y. (18 Sick.) 627; reversing S. C., 4 Hun, 728. But in order to charge an officer for breach of duty a valid writ is necessary. *Putnam v. Traeger*, 66 Ill. 89. And see *Waldron v. Berry*, 51 N. H. 136; *Housh v. People*, 75 Ill. 487.

A justice of the peace, in an action regularly brought before him to recover a penalty for less than \$200, has jurisdiction to pass upon every question involved in the action, including the validity of the law imposing the penalty ; and his judgment, so long as it remains unreversed, is conclusive between the parties upon every question necessarily embraced therein. And process regularly issued on such judgment, authorizing the imprisonment of the defendant therein, is a protection in an action for false imprisonment to the officer executing it, and to the parties at whose instance it was issued and served. *Hallock v. Dominy*, 69 N. Y. (24 Sick.) 239 ; reversing S. C., 7 Hun, 52.

Where an officer made an arrest on a writ upon which the affidavit was sworn to before the same person, as magistrate, who filled out the writ as attorney for the plaintiff therein, it was held that the fact that the writ and affidavit were regular on their face was a sufficient protection to the officer. *Underwood v. Robinson*, 106 Mass. 296.

Public officers charged with *quasi* public trusts, in the discharge of which private persons are interested, under laws creating the obligations of contracts, are not answerable for the misconduct of their predecessors. If any former officer has been guilty of a breach of such a trust, he is responsible ; his successors are not. Each is answerable in his own time for his own discharge of duty. *Vose v. Reed*, 54 N. Y. (9 Sick.) 657.

If a party contracts as a public officer, and in that capacity acts honestly, he will not ordinarily be personally liable. If his authority to act is defined by public statute, all who contract with him will be presumed to know the extent of his authority, and cannot allege their ignorance as a ground for charging him with acting in excess of such authority, unless he knowingly misled the other party. *Newman v. Sylvester*, 42 Ind. 106 ; Vol. 1, pp. 260-263.

A board of commissioners, appointed by the legislature, with power to turn or straighten the channel of a river, in order to protect a populous portion of the State from threatened inundation, are not liable for damages caused by the work, resulting from mere errors of judgment, provided they keep within the scope of their powers, and exercise their judgment honestly and do not act maliciously, oppressively or arbitrarily. *Green v. Swift*, 47 Cal. 536.

Whether the exigency of a particular case requires the board of prison directors to annul a contract made for the employment of convict labor is a question which addresses itself to their judgment, and their determination thereon is in the nature of a judicial and not of a ministerial act, and for which, if they act without fraud or malice, they do not incur personal liability. *Porter v. Haight*, 45 Cal. 631.

Indeed, it has been held that where a duty, judicial in its nature, is imposed upon a public officer or a municipal corporation, a private action will not lie for misconduct or delinquency in its performance, even if corrupt motives are charged. *Wilson v. Mayor, etc., of New York*, 1 Denio, 595. See *Gregory v. Brooks*, 37 Conn. 365.

An officer who is made liable by statute to a penalty, if he refuses to execute a writ, cannot be held liable for serving the writ in good faith, where the process is valid on its face, and issued by the proper authority. *Dunn v. Gilman*, 34 Mich. 256.

In an action against an officer for forcibly entering a house, making an assault and carrying away furniture, he may show, in mitigation of damages, that he entered to make an attachment, although the same was unlawful by reason of the writ not having been returned into court. He may also show that a settlement was made by the parties to the writ, stipulating that the property be restored and the writ not returned. *Paine v. Farr*, 118 Mass. 74.

§ 5. **When not a defense.** A ministerial officer, charged by statute with an absolute and certain duty, in the performance of which an individual has a special interest, is liable to an action if he refuses to perform it, and he is not relieved from the consequences of his disobedience because it is prompted by an honest belief upon his part that the statute is unconstitutional. *Clark v. Miller*, 54 N. Y. (9 Sick.) 528. But see *Sumner v. Beeler*, 50 Ind. 341; 19 Am. Rep. 718.

A ministerial officer—as a tax collector—is not protected in the execution of process, though regular on its face, if he has knowledge of facts which render it void. *Leachman v. Dougherty*, 81 Ill. 324.

In an action brought against a sheriff for failure to return an execution, it is no defense that, prior to the return day, defendant received a warrant of attachment against the plaintiff, a copy of which he served upon the judgment debtor, and received a certificate acknowledging indebtedness to the plaintiff in the amount of the judgment. The attachment does not prevent the sheriff from collecting the execution, nor does the service of the attachment dispense with the duty imposed upon him of returning the execution. *Wehle v. Conner*, 63 N. Y. (18 Sick.) 258; S. C., 8 Jones & Sp. 24. And where a party who wrongfully takes the property of another, afterward procures it to be seized and sold under process in his own favor, this affords him no protection and is no defense in an action against him for the wrong. *Wehle v. Butler*, 61 N. Y. (16 Sick.) 245; S. C., 3 Jones & Sp. 1. Vol. 6, pp. 113, 114; Vol. 2, pp. 467, 468.

Where a statute authorizes constables to arrest, without warrant, on their own view, or speedy information of others, persons guilty of des-

ignated offenses, a constable who arrests a person for one of such offenses, on a warrant which he supposes to be valid, but which is in fact void, and without other information than that contained in the warrant, cannot plead the statute in justification of the arrest. *Perry v. Johnson*, 37 Conn. 32. And a warrant of arrest or imprisonment, omitting the christian name of its defendant, is no protection to the officer serving the same. *Prell v. McDonald*, 7 Kans. 426 ; 12 Am. Rep. 423 ; *Mead v. Haws*, 7 Cow. 332.

An officer is not protected by his process, against an action for false imprisonment, where the arrest is made after the defendant, against whom the warrant was issued, had, subsequent to the date of the warrant and prior to the arrest, entered into a recognizance to appear and failed so to do. *State v. Queen*, 66 No. Car. 615.

Trover will lie against an officer for taking chattels under a writ of replevin, issued for the replevy of goods attached, where there has been no attachment in fact, and the person from whom the officer takes them holds them, not under process, but as owner. *Driscoll v. Place*, 44 Vt. 252.

Where a statute regulating canals vests in canal commissioners the authority to decide what property may be taken for use in making repairs, and imposes on a superintendent the duty of executing their decisions, the latter officer acts ministerially, and is individually liable for injuries caused by an unauthorized act. It is true that he is bound to exercise his discretion as to the methods and instrumentalities to be employed ; but this is true of all ministerial officers, and has never been held to give them the immunity of judicial officers. *Hicks v. Dorn*, 42 N. Y. (3 Hand) 47 ; S. C., 9 Abb. Pr. (N. S.) 47.

§ 6. **Who may interpose the defense.** A town board of equalization, in determining the value of land, act judicially, and are not liable in a civil suit for illegal, malicious or corrupt conduct. *Steele v. Dunham*, 26 Wis. 393.

The rule that officers acting in a discretionary capacity are not liable for a mere error of judgment was applied to the torts of a convict, permitted, by a warden or inspector of a State penitentiary, to go at large. *Schoettgen v. Wilson*, 48 Mo. 253.

Special constables will not be justified in committing a trespass in attempting to serve a writ directed "to any constable of the county," etc. *Schaw v. Dietrichs*, 1 Wils. (Ind.) 153. The act of a public enemy in forcibly seizing or destroying property of the government in the hands of a public officer, against his will, and without his fault, is a discharge of his obligation to keep such property safely and of his official bond, given to secure the faithful performance of that duty, and have the

property forthcoming when required. *United States v. Thomas*, 15 Wall. 337.

§ 7. **How interposed.** Whenever one justifies an act which, in itself, constitutes at common law a wrong, upon the process, order or authority of another, he must set forth, in a traversable form, the process or authority relied upon, and no mere averment of its legal effect will answer. So, where military officers of the United States, being sued for the arrest and imprisonment of a person in Vermont, not connected with the military service, alleged that the arrest and imprisonment were made under the authority and by the order of the president, without setting forth any order, general or special, of the president, directing or approving of the acts, it was held that the pleas were defective and insufficient. *Bean v. Beckwith*, 18 Wall. 510.

A plea justifying an arrest on suspicion of felony without a warrant, but not setting forth the grounds of the suspicion, is bad on demurrer. *Wade v. Chaffee*, 8 R. I. 224 ; 5 Am. Rep. 572.

For the requisites of a plea justifying trespass under legal process, see *Blalock v. Randall*, 76 Ill. 224.

CHAPTER XXXVIII.

JURISDICTION.

ARTICLE I.

WANT OF, AS A MATTER OF DEFENSE.

Section 1. In general. Any act of a tribunal beyond its jurisdiction is null and void, and of no effect whatever (*Lovejoy v. Albee*, 33 Me. 414; *Kenney v. Greer*, 13 Ill. 432; *Corwithe v. Griffing*, 21 Barb. [N. Y.] 9; *State v. Richmond*, 26 N. H. 232), whether without its territorial jurisdiction (*Ableman v. Booth*, 21 How. [U. S.] 506; *Cook v. Walker*, 15 Ga. 457), or beyond its powers. *Gormly v. McIntosh*, 22 Barb. (N. Y.) 271; *Kenney v. Greer*, 13 Ill. 432; *Hill v. Robertson*, 1 Strobb. (So. Car.) 1; *Clark v. Holmes*, 1 Doug. (Mich.) 390; *Wickliffe v. Bailey's Adm'r*, 5 B. Monr. (Ky.) 261; *Barrett v. Crane*, 16 Vt. 246. The domicile of a deceased person is the place of primary and exclusive jurisdiction in the settlement of his estate. *Leonard v. Putnam*, 51 N. H. 247; 12 Am. Rep. 106.

The want of jurisdiction may be taken advantage of by plea in abatement (see *ante*, chapter on *Abatement*, Vol. 6; *Smith v. Elder*, 3 Johns. [N. Y.] 105; *Waterman v. Tuttle*, 18 Ill. 292; *Whyte v. Gibbs*, 20 How. [U. S.] 541. See *Campbell v. Chaffee*, 6 Fla. 724), and must be taken advantage of before making any plea to the merits, if at all, when it rises from formal defects in the process, or when the want is of jurisdiction over the person. *Smith v. Curtis*, 7 Cal. 584; *Bohn v. Devlin*, 28 Mo. 319; *The Clyde & Rose Plank R. Co. v. Parker*, 22 Barb. (N. Y.) 323; *Brown v. Webber*, 6 Cush. (Mass.) 560; *Hall v. Mobley*, 13 Ga. 318; *Whyte v. Gibbs*, 20 How. (U. S.) 541; *Johnston v. Fort*, 30 Ala. (N. S.) 78. But where the cause of action is not within the jurisdiction granted by law to the tribunal, it will dismiss the suit at any time when the fact is brought to its notice. *Gormly v. McIntosh*, 22 Barb. (N. Y.) 271; *Wildman v. Rider*, 23 Conn. 172; *Thompson v. Morton*, 2 Ohio St. 26; *Wickliffe v. Bailey*, 5 B. Monr. (Ky.) 261; *Stoughton v. Mott*, 13 Vt. 175; *Brownfield v. Weicht*, 9 Ind. 394.

In respect to a court of general jurisdiction, it is to be presumed that the court had jurisdiction till the contrary appears. But the want of

jurisdiction may always be shown by evidence, except when jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of that party who avers jurisdiction. Then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction, until set aside, or reversed by a direct proceeding upon appeal, or a writ of error. *Wright v. Douglass*, 10 Barb. (N. Y.) 97; *Huntington v. Charlotte*, 15 Vt. 46; *The State v. Seaborn*, 4 Dev. 305; *Bearbien v. Brinckerhoff*, 2 Scam. 269. But no presumption is to be made in favor of inferior tribunals; their jurisdiction must appear upon the face of their proceedings. *Granite Bank v. Treat*, 18 Me. 340; *Barrett v. Crane*, 16 Vt. 246; *The State v. Kinbrough*, 2 Dev. 431; *Straughan v. Inge*, 5 Ind. (Porter) 157; *Perkins v. Attaway*, 14 Ga. 27. And if a particular jurisdiction does not show the matter to be within its authority it must be taken to be without it. *The State v. Shreeve*, 3 Green, 57. So, also, persons exercising a special delegated authority must show, upon the face of their proceedings, that they have acted within their prescribed limits. *New Jersey Railroad v. Suydam*, 2 Harr. 25. State courts have jurisdiction in actions of assumpsit brought against a national bank for the recovery of money paid as usury. *Dow v. Irasburgh Nat. Bank of Orleans*, 50 Vt. 112. So of an equitable action on a bond conditional upon the validity of a patent. *Middlebrook v. Broadbent*, 47 N. Y. (2 Sick.) 443; 7 Am. Rep. 457. So of an action to compel the performance of an agreement to assign a patent. *Binney v. Annan*, 107 Mass. 94; 11 Am. Rep. 457. So of an action to rescind a contract for the sale of a patent right, brought on the ground of the false and fraudulent representations of the vendor as to its value. *Page v. Dickerson*, 28 Wis. 694; 9 Am. Rep. 532. So in an action in a State court to recover the price agreed to be paid for a patent right, the defendant may show want or failure of consideration, by showing that the patent is void for want of novelty. *Rice v. Garnhart*, 34 Wis. 453; 17 Am. Rep. 448. But a State court has no jurisdiction of an action by the owner of a patent to recover compensation for its use from one who has used it without his consent (*De Witt v. Elmira Nobles Manuf. Co.*, 66 N. Y. [21 Sick.] 459; 23 Am. Rep. 73); nor of an action for an injunction to restrain the publication of circulars injurious to the plaintiff in regard to a patent right. *Hovey v. Rubber Tip Pencil Co.*, 57 N. Y. (12 Sick.) 119; 15 Am. Rep. 470.

§ 2. In actions upon judgments. The judgment of a court of one State has no binding effect in another, unless the court had jurisdiction of the subject-matter, and of the persons of the parties. Want of jurisdiction is a matter which may always be interposed against a judgment when sought to be enforced, or when any benefit is claimed

under it, the want of jurisdiction, either of the subject-matter or of the person of either party, renders a judgment a mere nullity. *Kerr v. Kerr*, 41 N. Y. (2 Hand) 272; *Windsor v. Mc Veigh*, 93 U. S. (3 Otto) 274; *Braswell v. Downs*, 11 Fla. 62; *Lawrence v. Jarvis*, 32 Ill. 304; *Obicini v. Bligh*, 1 M. & Scott, 447; 8 Bing. 335; overruling *Molony v. Gibbons*, 2 Camp. 504. And although judgments rendered in other States are not treated as foreign, yet they are not so far domestic that they can be enforced without a new judgment; but they are conclusive of every thing, except jurisdiction over the parties or of the subject-matter. If the service upon the defendant was good, under the laws of the State where the suit was brought, and gave the court jurisdiction over his person, the judgment under it furnishes *prima facie* evidence of indebtedness. *Barney v. White*, 46 Mo. 137; *Zimmerman v. Helser*, 32 Md. 274; *Chew v. Brumagin*, 21 N. J. Eq. 520. And see *ante*, Vol. 4, pp. 191 and 192; *Vanquelin v. Bouard*, 15 C. B. (N. S.) 341; 12 W. R. 128; 9 L. T. (N. S.) 582; *Scott v. Pilkington*, 2 B. & S. 11; *Phillips v. Godfrey*, 7 Bosw. (N. Y.) 150; *Ragan v. Cuyler*, 24 Ga. 397.

A joint judgment against two parties, one of whom only was served with process, is voidable. *Mewburg v. Munshower*, 29 Ohio St. 617; 23 Am. Rep. 769.

An averment of due service of process or notice, in a judgment entry which appears from the whole record to be untrue, or is not affirmatively supported by the facts contained in such record, is a nullity, and may be disregarded. *Neff v. Pennoyer*, 3 Sawyer, 274. A recital in a judgment roll, that the defendant was served with process, and appeared in an action, is not conclusive. *Ferguson v. Crawford*, 70 N. Y. (25 Sick.) 253.

And though the decisions vary upon the point, yet the better rule is that neither the constitutional provision, that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, nor the act of congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered. The record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction, either as to the subject-matter, the person, or the proceedings *in rem* as to the thing. And, if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. *Pennywit v. Foote*, 27 Ohio St. 600; 22 Am. Rep. 340; *Kerr v. Kerr*, 41 N. Y. (2 Hand) 272; *Hunt v. Hunt*, 72 N. Y. (27 Sick.) 217. And see *ante*, Vol. 4, p. 192, and cases there cited. Hence a judgment

of divorce granted in another State, under laws requiring a year's residence on the part of the plaintiff before suing, as a condition of jurisdiction, may be impeached, when produced in evidence in another proceeding in the courts of New York, notwithstanding the record alleges the necessary residence, and shows the appearance of an attorney at law for the defendant, by proof that the plaintiff never was a resident of the State in which the divorce was obtained, and that the appearance for the defendant was entered without authority. *Kerr v. Kerr*, 41 N. Y. (2 Hand) 272. So, judgments in divorce suits may be impeached and set aside for fraud, in the same manner as in other actions. *Adams v. Adams*, 51 N. H. 388; 12 Am. Rep. 134; *Sewall v. Sewall*, 122 Mass. 156; 23 Am. Rep. 299; Vol. 2, pp. 615, 617.

Other decisions hold that, if the record shows that the court which pronounced judgment had jurisdiction of the person of the defendant, the judgment will be conclusive of the rights of the parties, and no evidence can be heard to impeach it. But where the record fails to show a proper service, or an appearance, the defendant may show that he was not within the territorial jurisdiction of the court, and in no manner submitted himself to its jurisdiction. *Zepp v. Hager*, 70 Ill. 223. And see *ante*, Vol. 4, p. 192, and cases there cited.

The common-law presumption in favor of the jurisdiction, and regularity of the proceedings of courts of record or general jurisdiction, had its origin in the fact that, at common law, no judgment could be given against a defendant until he had appeared in the action. No such presumption does or ought to apply in cases, where the defendant is a non-resident, and there was no appearance, and only constructive service of the summons by publication. *Neff v. Pennoyer*, 3 Sawyer, 274. So, judgment rendered in an action upon which the property of a non-resident defendant has been attached, but in which no personal service has been obtained, is not a judgment *in personam*, and cannot be made the basis of an action of debt. *Eastman v. Wadleigh*, 65 Me. 251; 20 Am. Rep. 695; *Miller v. Dungan*, 36 N. J. Law, 21; *Price v. Hickok*, 39 Vt. 292.

When suit is brought on a foreign judgment against two or more joint defendants, want of jurisdiction, in the foreign court, over either of such defendants may be pleaded in bar of the action by the other defendant. *Mackay v. Gordon*, 34 N. J. Law, 286; *Frothingham v. Barnes*, 9 R. I. 474; *Oakley v. Aspinwall*, 4 N. Y. (4 Const.) 513.

An action may be maintained in one county on a judgment of a district court in another county, without averring personal service of summons in the first county, by filing a copy thereof with the petition; and if such copy is not filed, the defendant may move to dismiss the

same, but he cannot take advantage of the omission by demurrer. *Burnes v. Simpson*, 9 Kans. 658.

Where a suit in equity is brought in one State, to enforce a decree obtained in the courts of another State, the court will not inquire into the merits of such decree. But when the case shown by the record is such that no court could, upon any principles of law, have given the judgment unless imposed upon, this will be regarded as proof that the judgment was obtained by fraud on the court. *Davis v. Headley*, 22 N. J. Eq. 115. See, too, *Messina v. Petrocochino*, 4 L. R. P. C. 144; 41 L. J. P. C. 27; 20 W. R. 451; 26 L. T. (N. S.) 561.

Want of jurisdiction is matter of defense. So in bringing suit upon a judgment recovered in a sister State, it is not necessary to allege in the complaint that the court, if of record, in which the judgment was rendered, has jurisdiction either of the subject-matter of the action, or of the defendant. *Phelps v. Duffy*, 11 Nev. 80; *Tenney v. Townsend*, 9 Blatchf. 274; *Nunn v. Sturges*, 22 Ark. 389; *Dunbar v. Hal-lowell*, 34 Ill. 168; *Buffum v. Stimpson*, 5 Allen (Mass.), 591. But see *Karns v. Kunkle*, 2 Minn. 313. In an action upon a foreign judgment it must clearly appear from the transcript of the proceedings that the defendant was subject to the jurisdiction of the foreign court, and that the judgment pronounced against him was final, and for a definite sum. *Obicini v. Bligh*, 1 M. & Scott, 477; 8 Bing. 335, overruling *Molony v. Gibbons*, 2 Camp. 502. And in an action on a judgment rendered in another State, the declaration must show that the court rendering it had jurisdiction, both of the cause of action and of the person of the defendant; and jurisdiction of the action is not shown by setting out the record of the judgment. *Gebhard v. Garnier*, 12 Bush (Ky.), 321; 23 Am. Rep. 721. A valid, unsatisfied judgment in one State, is a bar to an action in another State, upon the original demand, and the defendant may plead such judgment in bar. *Henderson v. Staniford*, 105 Mass. 504; 7 Am. Rep. 551. Accord and satisfaction is a good defense to an action upon a judgment. *Savage v. Everman*, 70 Penn. St. 315; 10 Am. Rep. 676. As to the effect of an appeal from a judgment, see *Faber v. Hovey*, 117 Mass. 107; 19 Am. Rep. 398; Vol. 6, pp. 777, 778.

To sustain an action upon a judgment of a court of limited jurisdiction in another State, the plaintiff must allege and prove that the court had jurisdiction of the subject-matter of the suit and of the person of the party against whom judgment was rendered. A mere transcript of the docket is not sufficient at common law. *Cole v. Stone, Hill & Denio* (N. Y.), 360; *Draggou v. Graham*, 9 Ind. 212. So, where in summary proceedings in the courts of a sister State, not ac-

ording to the course of the common law, the jurisdiction of the court depends on a preliminary fact, the record must show the existence of the fact, or that the court determined its existence. *Gunn v. Howell*, 27 Ala. 663.

In an action of debt on a foreign judgment, the defendant pleaded that the court in which the judgment was obtained was a court of inferior jurisdiction, that he was not served with process, never authorized an appearance by attorney, and had no notice of the suit, to which plea the plaintiff demurred and it was held that the plea presented a bar to a recovery in the action, unless an issue was made upon the facts, and found for the plaintiff. *Shufeldt v. Buckley*, 45 Ill. 223.

Pleas in bar to an action on a judgment of a sister State must deny all the facts which would go to show jurisdiction, and the objection cannot be raised for the first time on appeal. *Latterett v. Cook*, 1 Clarke (Iowa), 1. So it is not sufficient for the defendant to answer that he was not a resident of the State where the judgment was rendered, that he had no agent there, and that he was not served with notice; *non constat* that he did not voluntarily appear. *Struble v. Malone*, 3 Clarke (Iowa), 586. A plea to an action of debt on a judgment of a sister State, averring that the proceeding was not within the jurisdiction of the superior court of the State by the laws thereof, is not a good plea. *Davis v. Connelly*, 4 B. Monr. (Ky.) 136. To a count upon a foreign judgment, a plea that the foreign court had no jurisdiction, because the defendant in the action there was not a trader and was not resident within a certain district, is bad, inasmuch as consistently with it, the foreign court had jurisdiction over the person of the defendant and the subject-matter of the action, which was sufficient. *Vanquelin v. Bouard*, 15 C. B. (N. S.) 341; 10 Jur. (N. S.) 566; 33 L. J. C. P. 78; 12 W. R. 128; 9 L. T. (N. S.) 582.

The record of a judgment against an administrator in one State is not evidence of a debt against an administrator of the same estate in another State. And no suit can be maintained against an administrator in one State, upon a judgment recovered against the administrator of the same estate in another State, where the original demand upon which the judgment was recovered is barred by the statute of limitations of the State where the suit is brought. *McLean v. Meek*, 18 How. (U. S.) 16.

The law of a foreign country being that shareholders of a company there established are subject to the provisions in the articles of association by taking shares in such a company, the articles of association of which provide that all disputes shall be submitted to the jurisdiction of a tribunal in such country, and that a shareholder shall, in

certain events, elect a domicile within the jurisdiction whereat process shall be served, or, in default, that such election shall be made for him, an English subject, neither resident, nor domiciled in the foreign country, becomes bound by legal proceedings there in a suit against him for calls, if process has been duly served at a domicile elected for him under the provision aforesaid, although he may have had no notice or knowledge of such proceedings; for he has contracted to be bound thereby and an action may be maintained in England upon a judgment recovered against him in such suit. *Copin v. Adamson*; *Copin v. Strahan*, 9 L. R. Exch. 345; 43 L. J. Exch. 161; 22 W. R. 658; 31 L. T. (N. S.) 242.

A judgment of a foreign court, obtained in default of appearance against a party, cannot be enforced in an English court, when he at the time when the suit was commenced was not a subject of, nor resident in the country in which the judgment was obtained, for there existed nothing imposing on the party any duty to obey the judgment. *Schibsy v. Westenholz*, L. R., 6 Q. B. 155; 40 L. J. Q. B. 73; 19 W. R. 587.

The question whether due validity and effect have or have not been accorded to the judgment of the Federal court will depend on the circumstances of the case. If jurisdiction of the case was acquired only by reason of the citizenship of the parties, and the State law alone was administered, then only such validity and effect can be claimed for the judgment as would be due to a judgment of the State courts under like circumstances. *Dupasseur v. Rochereau*, 21 Wall. 130.

The rules governing the presumptions of jurisdiction indulged in aid of judgments of superior courts of general jurisdiction, and those which apply to judgments of limited or special authority, are stated at length in *Galpin v. Page*, 18 Wall. 350.

In a civil action in a sister State, the defendant was not served with process, and did not appear, but being proceeded against in the name of the State for contempt in resisting an attachment therein, he appeared by counsel in the proceeding for contempt. It was held that an action could not be maintained in Massachusetts on a judgment rendered against him in the suit. *McDermott v. Clary*, 107 Mass. 501.

Judgments rendered by the courts of Arkansas during the rebellion, and under authority derived from the Constitution of 1861, are absolutely null and void. *Penn v. Tollison*, 26 Ark. 545; *Thompson v. Mankin*, 26 Ark. 586.

§ 3. **In trespass against officers.** Public officers cannot be made trespassers *ab initio*, unless by proof of some positive wrongful act, giving character to the original act, incompatible with the exercise

of the legal right to do the first act. *Stoughton v. Mott*, 25 Vt. (2 Deane) 668. And where an officer acts under process in the discharge of his ministerial duty, and does not exceed his authority, he will be protected though the process is not sufficient; but where he acts officiously and as a volunteer, he must himself show that the process was legal and sufficient. *Hunt v. Ballew*, 9 B. Monr. (Ky.) 390; *Slomer v. People*, 25 Ill. 70; *Bogert v. Phelps*, 14 Wis. 88. So he is protected in the execution of the process of a court of limited jurisdiction, when it shows upon its face that the court had jurisdiction of the subject-matter, and nothing appears to apprise him that the court had not also jurisdiction of the person of the defendant. *Barnes v. Barber*, 6 Ill. (1 Gilm.) 401. He is protected, if the process be regular on its face, though he may know facts making it void for the want of jurisdiction (*People v. Warren*, 5 Hill, 440), provided he is not an actual participator in the irregularity. *Hart v. Dubois*, 20 Wend. 236.

One who, acting under process, abuses it, is a trespasser *ab initio*, and is liable as if he acted wholly without it. *Breck v. Blanchard*, 20 N. H. 323; *Wilson v. Ellis*, 28 Penn. St. 238. But to make one, who originally acted with propriety under legal process liable *ab initio* for subsequent illegal acts, he must be shown to have grossly abused the authority under which he acted; such a mistake, as a person of ordinary care and common intelligence might commit, will not amount to an abuse; but there must be such an illegal exercise of the authority, to the prejudice of another, as will warrant the conclusion that its perpetrator intended from the first to do wrong, and to use his legal authority as a cover to his illegal conduct. *Taylor v. Jones*, 42 N. H. 25; *Puge v. DePuy*, 40 Ill. 506.

Where an order of a judge has been granted in error of fact, although that error of fact is known to the sheriff when he executes the order, his duty is to obey and execute the lawful mandates of the court, and, in the discharge of this duty, he is justified and protected by the law, and cannot be held liable in damages. *Brainard v. Head*, 15 La. Ann. 489. And see *Hodgson v. Millward*, 3 Grant (Penn.), 406. So it is a good defense, to an action of trespass against an officer of the navy for acts done by him, to show that the same were done by virtue of lawful and public orders from the President of the United States and the Secretary of the Navy. *Durand v. Hollins*, 4 Blatchf. C. C. 451.

In a suit by an execution defendant against an officer for taking his property, the execution, if regular upon its face, is a sufficient defense without proof of the judgment: perhaps, also, even if no such judgment exist. *Mower v. Stickney*, 5 Minn. 397. But this protection is con-

finéd strictly to the officer; and any other person claiming the benefit of the official acts of the officer must prove the judgment in the usual manner; as must also the officer when he is asserting a *quasi* title by virtue of the levy, as against any other party than the judgment debtor. *Id.*; Vol. 6, p. 115. And though it is not necessary for the officer to plead the judgment, yet he ought to describe the execution with sufficient certainty, stating out of what court or by what authority it issued, and giving such information in the defense, as may show the plaintiff what is relied upon. *Cook v. Miller*, 11 Ill. 610; Vol. 6, p. 115.

An attorney who issues an execution for his client, upon which property of a third party is sold, but who takes no part in the seizure, is not liable to the owner in trespass. *Hammon v. Fisher*, 2 Grant's (Penn.) Cas. 330.

When a magistrate has jurisdiction, as well over the offense as over the person of the offender, his acts, though ever so erroneous, will not make him a trespasser; and a conviction by him still subsisting, and valid upon its face, on a subject within his jurisdiction, is a legal bar to an action for any thing done under such conviction. *Lancaster v. Lane*, 19 Ill. 242. And see *ante*, chapter 37, "Judicial Proceedings," § 2, p. 174.

Where the supervisors have jurisdiction to issue a tax-warrant, they are not liable in trespass because they may have erred in allowing an improper item. *Parish v. Golden*, 35 N. Y. (8 Tiff.) 462.

Although a trespass is committed by the order of the authorities of a State acting in pursuance of the laws thereof, it cannot be justified when the State is engaged in rebellion against the government and laws of the United States. *Lively v. Ballard*, 2 W. Va. 496.

In trespass against an officer for taking exempt goods on execution, it is not necessary to prove the official character of the officer who issued the writ under which defendant acted, nor the official character of the defendant in the suit. *Wymond v. Amsbury*, 2 Col. T. 213. And in an action of trespass for carrying away personal property, if the defendant seeks to justify under a writ of replevin, he must show a valid writ, issued by a court of competent jurisdiction, attested in the usual form, particularly describing the property taken, with sufficient certainty to identify it; or, in case the writ is lost or destroyed, its contents must be proved. *Taylor v. Morrison*, 73 Ill. 565. See *ante*, 173, "Judicial Proceedings."

§ 4. In trespass against parties. If the judge of an inferior court has jurisdiction, although he may give a wrong judgment, provided the error results from the erroneous conclusion at which he arrives, neither the judge, nor the plaintiff in the judgment, can be

made a trespasser, by virtue of enforcing the same, if the judgment remains unrescinded and unpaid. *Deal v. Harris*, 8 Md. 40. See, too, *Kimball v. Malony*, 3 N. H. 376. And when the party does not control or direct the course of an officer, but requires him to proceed at his peril, and the officer makes a mistake of law in judging his official duty, whereby he becomes a trespasser by relation, the party is not affected by it, even when he receives the money coming by such irregularity, although aware of the course pursued by the officer. He is not liable unless he consents to the officer's course or subsequently adopts it. *Hyde v. Cooper*, 26 Vt. (3 Deane) 552; *West v. Shockley*, 4 Harr. (Del.) 287. And see *Woollen v. Wright*, 1 Hurl. & Colt. 554. But where he is active in the execution of process, as where he directs a levy upon exempt property, or gives a bond of indemnity in an attachment to induce the officer to hold, after levy, property not subject to the writ, there he becomes a joint trespasser with the officer. *Atkinson v. Gatcher*, 23 Ark. 101; *Lovejoy v. Murray*, 3 Wall. (U. S.) 1. And see *Ball v. Loomis*, 29 N. Y. (2 Tiff.) 412. So, if an execution plaintiff attends the sale of property wrongfully levied on and becomes himself a purchaser of a part thereof, he so far participates in the sale as to become jointly liable with the sheriff to an action of trespass. *Deal v. Bogue*, 20 Penn. St. (8 Harris) 228.

Although, in trespass, an officer may justify under final process, regular upon its face, issued from a court having jurisdiction of the subject-matter, without showing the judgment on which it is founded, yet the plaintiff in the process, or a stranger, must show a regular judgment. *Dixon v. Watkins*, 9 Ark. (4 Eng.) 139. And see *Mower v. Stickney*, 5 Minn. 397; Vol. 5, p. 115.

Under a plea of not guilty, in action of trespass, for taking and carrying away personal property, the defendant cannot be allowed to prove in mitigation of damages, or for any other purpose, that the act complained of was done under legal process. *Womack v. Bird*, 51 Ala. 504.

Trespass will not lie against a plaintiff, or his attorney, for suing out execution and arresting thereon a party who had obtained an order for protection from process, under a statute. *Yearsley v. Heane*, 3 D. & L. 265; 14 M. & W. 322. And no action lies against the sheriff or his officer for arresting a person attending court as a witness, although it is alleged that he knew he was privileged, and arrested him maliciously. *Magnay v. Burt* (in error), D. & M. 652; 5 Q. B. 381; 7 Jur. 1116.

The fact that a person who has assisted an officer in seizing goods, by authority of a lawful writ in replevin, acted wrongfully in obtain-

ing the writ, does not render him liable to an action of trespass; nor can he be sued in trover until the replevin suit has been determined. *Osgood v. Carver*, 43 Conn. 24.

§ 5. **In making title under judgments.** It is the satisfaction of a judgment in trespass only, that vests in the trespasser the title to goods seized under a void process, not the judgment *per se*. *Goldsmith v. Stetson*, 39 Ala. 183. But the defendant's title under satisfaction of a judgment in trespass for a conversion of chattels takes effect by relation from the time of the conversion. *Smith v. Smith*, 51 N. H. 571; Vol. 6, pp. 114, 115, 224, 225.

§ 6. **In defenses under process.** A ministerial officer is protected in the service of process, unless he shall act maliciously, if the process be regular on its face and do not disclose a want of jurisdiction, whenever there is jurisdiction of the subject-matter; and trespass will not lie for an act done under process, valid on its face, regularly issuing from a court of competent jurisdiction. *Woods v. Davis*, 34 N. H. 328; *Gray v. Kimball*, 42 Me. 299; *Mason v. Vance*, 1 Sneed (Tenn.), 178; *Ortman v. Greenman*, 4 Mich. 291; *Tefft v. Ashbaugh*, 13 Ill. 602. So trespass cannot be maintained against an officer who sells a horse by virtue of an execution, though the proceedings in the suit were irregular. *Billings v. Russell*, 23 Penn. St. (11 Harris) 189. And see *ante*, p. 175, § 3. Irregular and erroneous process is a justification until set aside or reversed. *Keniston v. Little*, 30 N. H. 318; *Riddell v. Pakeman*, 2 C. M. & R. 30; 1 Gale, 104; 5 Tyr. 721; *Cogburn v. Spence*, 15 Ala. 549; *Wilton Manuf. Co. v. Butler*, 34 Me. (4 Red.) 431. But if a constable have notice of an excess or want of jurisdiction in a justice to issue the process, he would render himself liable by acting under it. *McDonald v. Wilkie*, 13 Ill. 22. And if a process be void, the party who sets it in motion, and all persons aiding and assisting him, are *prima facie* trespassers, for seizing property under it. Acts which an officer might justify under process actually void, but regular and apparently valid on its face, will be trespasses as against the party. *Kerr v. Mount*, 28 N. Y. (1 Tiff.) 659. And an unlawful act cannot be justified by an unlawful authority to do it, as where a captain of a company of State troops, in 1865, by orders of an acting quarter-master, took and destroyed property without rendering compensation. *Hogue v. Penn*, 3 Bush (Ky.), 663. A sheriff who, acting by his deputy under color of his office, makes an unauthorized conversion of intoxicating liquors held in this State, is liable in an action of trespass *de bonis*, whether such liquors are intended for illegal sale in this or another State, or not. *Hamilton v. Goding*, 55 Me. 419.

If an officer has a lawful process authorizing him to seize property, he is guilty of a trespass, though he professes to act under another process which did not justify him. *Parish v. Wilhelm*, 63 No. Car. 50; *Crowther v. Ramsbottom*, 7 T. R. 654. The fact that a note has been paid before judgment does not make the judgment void, so that the judgment creditor becomes a trespasser by suing out an execution upon it. *Barnett v. Reed*, 51 Penn. St. 190. See *Twitchell v. Shaw*, 10 Cush. (Mass.) 46. An insufficient affidavit in the case of an attachment of the property of a non-resident debtor, which is capable of amendment and therefore not void, will furnish a good defense in an action of trespass against those acting under it in making such attachment. *Booth v. Rees*, 26 Ill. 45.

A party cannot justify taking the property of a third person, as an assistant of a sheriff, unless the property is in fact taken by the officer under his process. It is no justification of such taking that the assistant supposed, from the conduct of the officer, that the property had been attached. *Johnson v. Stone*, 40 N. H. 197.

In trespass, things done by authority should be specially pleaded. *Martin v. Clark*, 1 Hemp. 259. The plea should specify and particularly describe the process, and set out every fact necessary to show the justification; and if it vary, it cannot be given in evidence. *Harrison v. Davis*, 2 Stew. 350. Declarations of a defendant in an action of trespass for the removal of personal property, made during the removal, that he was acting under an execution against the owner, are no such proof of that fact as to make such execution a justification; it must be set up in the pleadings and legally proved at the trial. *Shultz v. Frank*, 1 Wis. 352.

§ 7. **In making title under process.** An officer, if he act under process apparently valid, but actually void, may avail himself thereof for defense but not for aggression. See *ante*, p. 176, *Judicial Proceedings*, chapter 37, § 4. Where, therefore, an officer, who, by virtue of a process valid upon its face, but void for want of jurisdiction in the court issuing it, has levied upon and taken possession of property, brings an action to recover the property against another officer, who, by virtue of process against the owner, apparently valid, has taken it from plaintiff's possession, the character of such possession is a subject of inquiry and attack, and the validity of the process under which the plaintiff acted may be shown; but defendant's process protects him and its validity cannot be assailed. *Clearwater, Jr., v. Brill*, 63 N. Y. (18 Sick) 627; reversing S. C., 4 Hun, 728.

§ 8. **Jurisdiction as to subject-matter.** Consent will not confer jurisdiction where the court has not jurisdiction of the subject-matter

of the action. *Chapman v. Morgan*, 2 Greene (Iowa), 374; *Jeffries v. Harbin*, 20 Ala. 387; *Riney v. McRae*, 14 Ga. 589. And where judicial tribunals have no jurisdiction of the subject-matter on which they assumed to act, their proceedings are absolutely void, in the strictest sense of that term; but where they have jurisdiction of the subject-matter, and irregularity or illegality in their proceedings do not render them absolutely void, but they may be avoided by proper and timely objections. *The State v. Richmond*, 26 N. H. 232. And see *Cochran v. Davis*, 20 Ga. 581; *Moore v. Robison*, 6 Ohio (N. S.), 302; *Greenlaw v. Kernahan*, 4 Sneed (Tenn.), 371.

The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: A court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to final judgment without setting forth in its proceedings the facts and evidence on which it is rendered, whose record is absolute verity not to be impugned by averment or proof to the contrary, is of the first description, there can be no judicial inspection behind the judgment, save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear upon the face of their proceedings, or they are nullities. *Grignon's Lessee v. Astor*, 2 How. (U. S.) 319. And see *ante*, pp. 181, 182, §§ 1 and 2.

Suits *in rem* are local, and the court within whose jurisdiction the thing is situated is the proper forum, though all the parties in interest are foreigners. There is an exception to the general rule where the thing has been brought within the jurisdiction of the court by a violation of the sovereign rights of another nation. *Lessee of Hickey v. Stewart*, 3 How. (U. S.) 750; *The Bee*, 1 Ware, 332.

When the subject-matter of the controversy is not within the jurisdiction of the court, the exception may be taken under the general issue, without a plea to the jurisdiction. *Maisonnaire v. Keating*, 2 Gallis. 325. A plea to the jurisdiction of a court in a transitory action is proper only when some court of the nation has jurisdiction of the cause of action, and not the court in which the suit is brought; and the plea must allege such jurisdiction or it is ill. *Lawrence v. Smith*, 5 Mass. 362; *Jones v. Winchester*, 6 N. H. 497.

§ 9. **Jurisdiction as to person.** Although a party cannot, by consent, give the court jurisdiction where it had none by law, yet, where the court had jurisdiction of the subject-matter and of the person, and the

defendant has some privilege which exempts him from the jurisdiction, he may waive the privilege if he chooses to do so. *Bostwick v. Perkins*, 4 Ga. 47; *Overstreet v. Brown*, 4 McCord, 79; *McLean v. La Fayette Bank*, 3 McLean, 587.

Although a court may acquire jurisdiction of parties by consent, yet a court of special and limited jurisdiction cannot, as such court, acquire jurisdiction of a subject-matter not conferred by the law of its creation. *Gilliland v. Sellers*, 2 Ohio (N. S.), 223; Vol. 1, p. 50.

When a court has obtained jurisdiction of the cause and of the parties, subsequent error in the proceedings does not render them void. *Carter v. Walker*, 2 Ohio St. 339.

CHAPTER XXXIX.

LICENSE.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition and nature. A license in an authority to do a particular act or series of acts upon the land of another without possessing any estate therein. *Cook v. Stearns*, 11 Mass. 533; *Taylor v. Waters*, 7 Taunt. 374; *Mumford v. Whitney*, 15 Wend. 380; *Bridges v. Purcell*, 1 Dev. & B. (No. Car.) L. 496. It is not an estate in land, being a lower interest than a tenancy at sufferance, for the right of possession must be in the licensor. It more resembles an easement. An easement is a liberty, privilege or advantage in land without profit distinct from the ownership in the soil, and a license is the same, but they differ in the permanency of the right. An easement must be created by deed and is an incorporeal hereditament, while a license may be created by parol and exists only at the will of the licensor. *Rathbone v. McConnell*, 20 Barb. 311.

The expression "go and kill him if you want to" made in May, by the owner of a domesticated buffalo in a heated conversation with one who was complaining of a trespass committed by it, and in reply to a threat to kill it, is not a license to such person to kill the animal in the following September. *Ulery v. Jones*, 81 Ill. 403.

Licenses are usually divided into executory and executed licenses, a distinction which is of importance as bearing on the right of the licensor to revoke the license. A license may, if executed in proper form, take effect as a grant as to some things, and as a mere license as to others. Thus in *Thomas v. Sorrell*, Vaughn, 350, 351, it is said, a dispensation or license properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful which without it had been unlawful, as a license to go beyond the seas, to hunt in a man's park, to come into his house are only actions which without license had been unlawful. But a license to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after, to his own use, are licenses as to the acts of hunting and cutting down the tree, but as to

the carrying away of the deer killed, and tree cut down, they are grants. So, to license a man to eat my meat or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood and warming him, they are licenses, but it is consequent necessarily to those actions that my property be destroyed in the meat eaten and in the wood burnt; so as in some cases by consequent and not directly, and as its effect, a dispensation or license may destroy and alter property. The following cases may illustrate the distinctions between an easement and a license. If I tell a man orally that he may cross my land, when and as long as he desires, he has a license to cross. If I use the same words in a deed, the grantee has an easement. If I give a man permission to flow my land, he has a license. Oral permission to enter land and cut and remove wood (*Greeley v. Stilson*, 27 Mich. 153); to throw waste matter into a stream (*Thompson v. McElarney*, 82 Penn. St. 174); to enter land and dig minerals (*Anderson v. Simpson*, 21 Iowa, 399), are each licenses, although if granted in proper terms by deed they would be easements imposed on the land. If these licenses in any of the ways we have hereafter to consider become irrevocable, they become in their nature easements of flowage, of mining and the like. In another way the easement takes its support from the title to the servient estate. If that is determined by a superior title, the easement fails. The license rests upon the person of the licensor. If he dies it determines. A license is not transferable, unless made so by its express terms and therein differs from any estate or absolute right which can always be transferred unless granted on the condition that it shall not be assigned.

An instrument intended to convey a larger interest may fail to give more than a license for want of due execution. Thus, a right of way would not be created by a writing not under seal, but it would be a mere license. On the other hand, an instrument executed with all the formality of a deed may be only a license, when such is its legal construction. *Blaisdell v. P. G. F., etc., R. R.*, 51 N. H. 483; *Vandenberg v. Van Bergen*, 13 Johns. 212; *Baldwin v. Aldrich*, 34 Vt. 526; *Muskett v. Hill*, 5 Bing. N. C. 694; *Wickham v. Hawker*, 7 M. & W. 76. Thus, where the owner of land gave a deed, conveying the right of building over certain land, during the pleasure of the grantee, it was held a mere license and not assignable. *Jackson v. Babcock*, 4 Johns. (N. Y.) 418. But in other cases a lease during the will of the lessee has been held to create a freehold. *Wood v. Beard*, L. R., 2 Exch. Div. 30 (19 Eng. 354). Every grant of the possession of land for a permanent use is an interest within the meaning of the statute of frauds, whether it be to enter upon it at all times without fresh con-

sent, or for the purpose of erecting and keeping in repair a house, embankment, canal or a dam to raise the water to work a mill or the like, and an agreement therefor must be in writing. *Mumford v. Whitney*, 15 Wend. (N. Y.) 380. Licenses to do a particular act upon the land do not trench upon the policy of the law, which requires that bargains respecting real estate shall be in writing, for in general they amount to nothing more than an excuse for an act which would otherwise be a trespass. *Davis v. Townsend*, 10 Barb. (N. Y.) 333; *Owens v. Lewis*, 46 Ind. 488; 15 Am. Rep. 295. For the license is a power or authority, and what is done under it is, in one sense, the act of the licensor himself. *Miller v. Auburn & Syracuse R. R.*, 6 Hill, 64. The license transfers no estate to the licensee. *Clinton v. McKenzie*, 5 Strobb. (So. Car.) 36. A parol license may excuse the non-performance of a contract under seal. *Langworthy v. Smith*, 2 Wend. 587; *Leavitt v. Savage*, 16 Me. 72; *Franklin Ins. Co. v. Hamill*, 5 Md. 170; *Stickney v. Stickney*, 21 N. H. 61. Though the opposite doctrine has prevailed in England. *West v. Blakeway*, 9 Dowl. P. C. 846. Therefore, one party cannot make a breach of the contract by the other, committed under his license, an excuse for non-performance. *French v. New*, 20 Barb. 481; *Jewell v. Blandford*, 7 Dana (Ky.), 472; *Smith v. Edwards*, 6 Vt. 687. So, if he accepts a modified performance. *McCombs v. McKennan*, 2 W. & S. (Penn.) 216. The fact that one party to an arbitration has prevented the arbitrators from making a valid award, will not deprive him of the right to show the invalidity of the one they did make. *French v. New*, 28 N. Y. (1 Tiff.) 147; 2 Abb. Ct. App. 209.

A parol license needs no consideration to make it a justification of acts done under it, though they would otherwise be trespassers. It will apply to and protect such servants and agents of the licensee, as the nature of the acts to be done may reasonably require. A license necessarily implies the right to do every thing, without which the act cannot be done. *Sterling v. Warden*, 51 N. H. 227; 12 Am. Rep. 80; *Curtis v. Gulvin*, 1 Allen (Mass.), 215. It may be granted upon such terms or conditions as the parties may determine, as to the time or mode of its enjoyment, and it will be no justification to the licensee unless the acts complained of are within these limitations. *Freeman v. Headley*, 33 N. J. Law, 523.

§ 2. **Of alienation or transfer of license.** A license is said to be, in general, so much a matter of personal trust and confidence that it does not extend to any but the licensee. *Mendenhall v. Klinck*, 51 N. Y. 246; *Dark v. Johnston*, 55 Penn. St. 164. The death of either party will revoke it. So would the alienation of the interest of the

licenser or licensee in the subject-matter of the license. *Ruggles v. Lesure*, 24 Pick. (Mass.) 187; *Prince v. Cuse*, 10 Conn. 375; *Jackson v. Babcock*, 4 Johns. (N. Y.) 418; *Emerson v. Fisk*, 6 Me. 200; *Carleton v. Redington*, 21 N. H. 291; *Wickham v. Hawker*, 7 M. & W. 63; *Desloge v. Pearce*, 38 Mo. 588; *Bridges v. Purcell*, 1 Dev. & B. 492. Where a license had been given to erect a dam and flow land, and both licenser and licensee had parted with their interest, it was held that either conveyance would be a revocation. *Cowles v. Kidder*, 24 N. H. 380. In a like case (*Cook v. Stearns*, 11 Mass. 538), it is said that transferring the land on which the acts were to be done to another, or even leasing it without any reservation, would of itself be a countermand of the license. So, where a license is given to cut the trees on certain land, and the licenser afterward conveyed the estate. *Drake v. Wells*, 11 Allen (Mass.), 143.

A license to one and his heirs and assigns is, by the contract of the parties, assignable. Thus, where two tenants in common parted their land by deed, and one deed reserved all the wood on the premises to the grantor, and his heirs and assigns, it was held as to the wood of the grantee, to have at least the effect of a parol transfer and a license to enter and cut, which was assignable without deed and protected the assignee. *Hill v. Cutting*, 107 Mass. 596.

Where the license has become irrevocable, in so far as it has been executed, it is an absolute right, and assignable. So, where the license is coupled with an interest it is irrevocable and assignable. Such is the implied license to enter and remove property sold from the land of the licenser. *Sterling v. Warden*, 51 N. H. 228. So, where the owner of land places upon it the goods of another, he gives to the owner of them an implied license to enter for the purpose of recaption (*Patrick v. Colerick*, 3 M. & W. 483; *Mussey v. Scott*, 32 Vt. 82); which is assignable, because irrevocable. A license may be assignable or transferable by its terms, as for instance, tickets of admission to theaters or concerts, which often run to bearer. *Coleman v. Foster*, 1 Hurl. & N. 37; *Drake v. Wells*, 11 Allen (Mass.), 144.

§ 3. **When writing required.** The ordinary rule is that a license is as valid when created by parol as when created by writing. It is not a conveyance of an interest in land, and no principle of the common law, and so far as known, no statute makes any writing directly necessary. Thus, where a license is claimed to remove goods from the land of a person who has sold them, the purchaser must of course prove a valid sale or the license would fail, and that may, under the statute of frauds, require a writing. So, where the license depends on some other contract, which by law or custom must be in writing. Thus

railroad tickets are contracts which import a license to enter upon the premises of the railroad, and the road may refuse by its rules to allow any person who is not the holder of such ticket, to enter their depots. A like case is that of written tickets of admission to theaters, concerts, and entertainments. *Coleman v. Foster*, 1 Hurl. & N. 37; *Drake v. Wells*, 11 Allen (Mass.), 144. In all cases the licenser may, if he choose, put his license in writing and recognize no other.

§ 4. **Implied licenses.** It is not necessary that a license should be created by express words or even by any words, if the acts of the parties imply the right. Where the owner of goods, situated on his own land, sells them, he by implication gives the purchaser a right to enter and remove them. *Nettleton v. Sikes*, 8 Mete. (Mass.) 34; *Wood v. Manley*, 11 Ad. & El. 34; *Parsons v. Camp*, 11 Conn. 525; *White v. Elwell*, 48 Me. 360; *Martin v. Houghton*, 45 Barb. 258. So, if a person places upon his own close the goods of another, he gives to the owner of them an implied license to enter and remove them. *Patrick v. Colerick*, 3 M. & W. 483; *Mussey v. Scott*, 32 Vt. 82, 84. But if they are placed upon the land of another, who is not a participant in the wrongful taking of them, the owner cannot enter to retake them unless in case of the fraud and fresh pursuit. 20 Vin. Abr. 506. From the necessity of the case, one, whose cattle escape upon the land of another, may follow and drive them back without being a trespasser, unless the escape itself was a trespass. *Sawyer v. Vermont & Mass. Railroad*, 105 Mass. 196. Permission to keep, or the right to have one's personal property upon the land of another, involves the right to enter for its removal. *Doty v. Gorham*, 5 Pick. (Mass.) 487. In case of sales, a license is implied because it is necessary to carry into complete effect the contract of the parties. The seller cannot deprive the purchaser of his property or drive him to an action for its recovery, by withdrawing his implied permission to come and take it. But there is no such inference to be drawn, when the property at the time of sale is not upon the seller's premises, or when by the terms of the contract it is to be delivered elsewhere. And when there is nothing executory or incomplete between the parties in relation to the property, and there is no relation of contract between them affecting it, except what results from the facts of ownership or legal title in one and possession in the other, no inference of a license to enter upon lands for its recovery can be drawn from that relation alone. *Anthony v. Haney's*, 8 Bing. 186; *Williams v. Morris*, 8 M. & W. 488. Thus, it was held in *McLeod v. Jones*, 105 Mass. 403; 7 Am. Rep. 539, that a mortgagee of personal property could not enter a house to take the goods, where the mortgagor had locked them up and left them, although he believed, with good

reason, that the mortgagor did not intend to return. The court say "a right to enter the premises of the mortgagor without legal process is not essential to the security of the mortgagee of personal property. Permission to do so is not implied therefore from the existence of that relation alone."

So, where a carpenter is erecting a building on the land of another, under contract, he has an implied license to enter while the contract is in force, and if it is rescinded before completion, he or his men may enter to remove their tools or other property. *Arrington v. Larrabee*, 10 Cush. (Mass.) 512. It was held a justification to one who entered a yard, that he came to view a mare which had been recently stolen from him. *Webb v. Beavan*, 6 M. & Gr. 1055. So, where the sale of a horse has been rescinded, for fraud, the seller may enter the premises of the buyer to reclaim him. *Wheelden v. Lowell*, 50 Me. 499. The mortgagee of chattels has an implied license to enter after foreclosure and take away the goods mortgaged. *McNeal v. Emerson*, 15 Gray (Mass.), 384.

A license may be proved by circumstantial evidence. *Harmon v. Harmon*, 61 Me. 222. Thus, the fact that a person opens a place for trade or for public entertainment, and thus impliedly invites persons to enter, will establish a license for them so to do. *Gilbert v. Nagle*, 118 Mass. 278; *Markham v. Brown*, 8 N. H. 523. So, a post-office is a public place; and though it may be established in a private building, there is a general license to all persons having proper business there to enter. *Sterling v. Warden*, 51 N. H. 228, 231; *Bennett v. State*, 30 Ala. 19. Thus, an innkeeper is said to be held to admit, not only travelers, but, under proper limitations, those who have business with them. He holds out his house as a public place to which travelers may resort, and of course surrenders some of the rights which he would otherwise have over it. *Markham v. Brown*, 8 N. H. 528. But he is not obliged to receive one as a traveler who is not able to pay for his entertainment (*Thompson v. Lacy*, 3 B. & Ald. 283); nor thieves (1 Hawk. Ch. 78); nor common brawlers, nor drunkards, nor idle persons, nor any one else who would subject his guests to annoyance. Vol. 4, p. 3. So, a wharfinger and warehouseman, by holding himself out as such, licenses all persons to enter his premises on business; but his business being merely a private one, unlike that of an innkeeper, he may revoke the license as to any particular person. *Bogert v. Haight*, 20 Barb. (N. Y.) 251. Vol. 6, p. 366. Evidence of a familiar intimacy in the family may also be given in support of a plea of license to enter a dwelling-house. *Adams v. Freeman*, 12 Johns. 408; *Martin v. Houghton*, 45 Barb. 258.

Evidence that land has been flowed for nine years, without objection by the owners who lived near, will justify a finding of license. *Occum Co. v. Sprague Co.*, 34 Conn. 529. So, where one has constructed a wharf on a navigable stream, he has given an implied authority to the owners of vessels to make fast there, and he cannot revoke the authority without due notice and opportunity for them to provide for their safety elsewhere; and if he cuts a vessel loose he will be liable for the damage caused. *Heaney v. Heaney*, 2 Den. 625. In another case it was held that the evidence did not show such a situation or customary use of the pier as would amount to a license for vessels to moor to it, and therefore the owner was not liable for cutting the boat loose. *Dutton v. Strong*, 1 Black (U. S.), 23. Long use of an alley-way to reach the rear of a block of stores, by teamsters, to carry goods to such stores, is competent evidence to prove a license. *Thayer v. Jarvis*, 44 Wis. 388. But it is held that an ordinary contract for the purchase and sale of land, which is silent as to the possession, does not raise, by implication, a license to enter on the premises. *Spencer v. Tobey*, 22 Barb. 260; *Lyfford v. Putnam*, 35 N. H. 563. And a license to enter land for the purpose of fishing cannot be established by proof of a custom of the region to fish on other's lands, without express permission. *Winder v. Blake*, 4 Jones' (N. C.) Law, 332. But if it was understood that the purchaser of land was to take immediate possession, it amounts to a license. *Van Deusen v. Young*, 29 N. Y. 9. Where a license to mine had been given on condition that the licensee paid rent, a distress by the landlord for such rent was held an implied waiver of the forfeiture and an election to continue the license. *Ward v. Day*, 4 Best & Sm. 337.

In other cases a license is implied on grounds of public policy. Thus, in cases of wrecks, strangers may go upon the beach for the purposes of saving life or property, and so in any other case where goods are in jeopardy of being lost or destroyed by water, fire or any like danger. *Dunwich v. Sterry*, 1 Brad. 831; *Proctor v. Adams*, 113 Mass. 376; 18 Am. Rep. 500. And where goods are taken or used under the pressure of a moral necessity, as where a shipmaster throws goods into the sea to save the ship, a license will be presumed, and it will be no conversion. *Bird v. Astock*, 2 Bulstr. 280. A license from a mother to a son to open the family tomb to deposit therein the body of a deceased son, will be implied from the relationship of the parties, the exigencies of the case and the well-established usages of a civilized and Christian community. *Lakin v. Ames*, 10 Cush. (Mass.) 198, 221. So, no action lies by the mother against her son-in-law, who has buried his wife in a public burial ground, for removing a stone placed at the grave

by the mother for the purpose of substituting another. *Durell v. Hayward*, 9 Gray (Mass.), 248; Vol. 1, pp. 130, 131.

§ 5. **Of the interest created.** A parol license to do a certain act or series of acts on the land of another does not convey any interest in the land, but is simply a privilege to be exercised upon the land; the statute of frauds does not apply, and such license is a sufficient justification to the licensee for entering upon the land of the licensor to do the act or acts thus licensed until it is revoked. *Pierrepoint v. Barnard*, 6 N. Y. (2 Seld.) 379; *Houston v. Laffee*, 46 N. H. 507; *Blaisdell v. P. G. F. & C. Railroad*, 51 id. 483; *New Orleans Co. v. Moye*, 39 Miss. 374. The license being revocable so far as it is not executed and as to all future enjoyment as we shall see *post*, p. 205, § 7, does not create an easement. *Hall v. Chaffee*, 13 Vt. 150; *Prince v. Case*, 10 Conn. 375. To hold otherwise would be giving to a parol license the force of a conveyance of a paramount easement in real estate. Such a doctrine cannot be sustained. No such right or interest in real estate can be created by parol. *Marston v. Gale*, 24 N. H. 176. In some cases, where a license has become irrevocable, the effect may be to give a right of enjoyment of long or indefinite duration, but not absolutely permanent in its nature, since whatever right is acquired is subject to the conditions of natural decay and there can be no repair after the revocation or expiration of the right. But in *Lacy v. Arnett*, 33 Penn. St. 169, which was the case of a license to build a dam and flow land of the licensor, the court held that the licensee had a right to rebuild. But see *post*, pp. 203, 204, 205.

The license will be held to carry with it all necessary incidents. Thus, a license to take stone implies a right to draw it carefully over the licensor's land with such servants and teams as may be necessary. *Clark v. Vermont & Canada Railroad*, 28 Vt. 103. A license to build a tomb gives a right of access and the licensee may remove any obstacles in the way. *Lakin v. Ames*, 10 Cush. (Mass.) 198. Where the license was to build a house, upon revocation the licensee may enter with such servants as are reasonably necessary to remove it. *Lee v. Meeker*, 2 Wis. 487. But no limitation on the rights of the licensor will exist after the license expires. Thus, after the termination of a license to have a building on the licensor's land, he is not liable for digging so near as to endanger it. *Mason v. Holt*, 1 Allen (Mass.), 45.

It is evident that although no interest in land can be created by a license, yet that, while it continues to subsist, it will be as effectual for the purpose of sustaining and justifying all acts to which its authority extends as if it operated on the estate instead of being merely personal to the party to whom it was given. So long as it remains unrevoked,

the latter may adopt the same course as if he possessed an interest in the land instead of a naked authority. The license may have an incidental effect on the title of property. Thus a house or other building, erected on land by the license of the owner, does not become the property of the land-owner as annexed to the soil, but remains the personal property of the licensee. *Hilborne v. Brown*, 12 Me. 162; *Smith v. Benson*, 1 Hill, 176; Vol. 2, p. 170; *Contra*, *Leland v. Gassett*, 17 Vt. 403.

A license to enter upon the land of another is construed as a license to enter by the usual mode of access provided by the owner as by the gate or bars. *Gardner v. Rowland*, 2 Ired. (No. Car.) 247.

A parol license to do acts on the land of the licensor as, for instance, to cut and carry away wood, must, when no time is limited, be acted upon within a reasonable time and must be considered as applying to the wood as substantially in the state in which it then was. *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120. By neglecting to act under the license within a reasonable time, the licensee lost the benefit of his contract. *Hill v. Hill*, 113 Mass. 103; 18 Am. Rep. 455. In the last case the license was to enter upon land at any and all times, and cut and carry away wood, and the court held that after three years it might be revoked, that being a reasonable time for the acts to be done. *Syron v. Blakeman*, 22 Barb. 336.

If a parol license be granted for a temporary purpose, as the permission to erect a dam or a bridge, it terminates with the decay of the structure and does not include a right to repair or renew. *Cook v. Stearns*, 11 Mass. 533; *Carleton v. Redington*, 21 N. H. 307; *Mumford v. Whitney*, 15 Wend. 380; *Wingard v. Tift*, 24 Ga. 179. But this would be determined by the nature of the works licensed, indicating the intent of the parties. *Hepburn v. McDowell*, 17 S. & R. 383. See *ante*, pp. 196, 202.

Where the license justifies an entry, no misbehavior of the licensee afterward will make him a trespasser *ab initio*, where the license is either express or implied by law as the contract of the owner of the premises (*Johnstown Iron Co. v. Cambria Iron Co.*, 32 Penn. St. 241; *Sterling v. Warden*, 51 N. H. 217), though of course he will be for the misconduct and wrongful acts so far as they exceed his license. Thus a license to pass through a field by gates or bars is not forfeited nor does the licensee become a trespasser *ab initio*, by leaving the bars down. *Stone v. Knapp*, 29 Vt. 501. If a person who has a license to build an arch over a way unnecessarily and unreasonably obstructs the way in building such arch, he is liable to an action on the case. *Cushing v. Adams*, 18 Pick. (Mass.) 110; *Sampson v. Henry*, 13 Pick. (Mass.)

36. But where the license is one given by the law to an officer of the law, any abuse of his authority will make him a trespasser *ab initio*. *Malcom v. Spoor*, 12 Metc. (Mass.) 279. Vol. 6, p. 87.

§ 6. **Limitations.** The right conferred by the license is limited in its duration, first, by any express provision of the contract, as for instance, a right to enter and cut wood for three years, or to maintain a building for a fixed time. *Glynn v. George*, 20 N. H. 114; *Mason v. Holt*, 1 Allen (Mass.), 45. If there is no express provision, the law, as in other cases, supplies the deficiency by limiting the enjoyment to a reasonable time (*Gilmore v. Wilbur*, 12 Pick. [Mass.] 120); and fifteen years was held an unreasonable time to cut and carry away wood. It may be limited by the nature of the act to be done. Thus the license given by law to remove goods sold from the land of the seller, from its nature, expires with the removal of the goods. A license to erect a particular structure would ordinarily confer no right to erect another if that was destroyed. *Carleton v. Redington*, 21 N. H. 291; *Stevens v. Stevens*, 11 Metc. (Mass.) 251; *Baldwin v. Aldrich*, 34 Vt. 526; *Wingard v. Tift*, 24 Ga. 179. The license may be granted upon some condition, either precedent or subsequent, and in the former case will have no force till the condition is performed, and in the latter will terminate *ipso facto* on a breach. *Freeman v. Headley*, 33 N. J. Law (4 Vroom), 523; *Gifford v. Brownell*, 2 Allen (Mass.), 535. The license may also be limited in the right conveyed, either expressly or by necessary implication. Thus, as we have seen, the license carries with it such privileges as are necessary to its reasonable enjoyment. *Clark v. Vermont & Canada Railroad*, 28 Vt. 103; *Sterling v. Warden*, 51 N. H. 227; *Curtis v. Galvin*, 1 Allen (Mass.), 215. On the other hand, it is implied that no unnecessary harm shall be done. Thus one licensed to enter and cross land must do so by the usual gate and path. *Gardner v. Rowland*, 2 Ired. (No. Car.) 247. And if there are gates it is the duty of the licensee to close them. *Stone v. Knapp*, 29 Vt. 501. So, if under his license he permits diseased sheep to mingle with those of his licensor, whereby those of the latter are affected by scab, he is liable. *Eaton v. Winnie*, 20 Mich. 156; 4 Am. Rep. 377. Where, after a husband and wife had separated, he told her she might have part of their furniture and might come and get it, she cannot come in his absence. *Crumb v. Oaks*, 38 Vt. 566. The licensee must assume all ordinary risks, but the licensor must not put any traps in the way. *Vanderbeck v. Hendry*, 34 N. J. Law (5 Vroom), 467. When the owner of land expressly or by necessary implication invites a person to come upon his land, he must not permit any thing in the nature of a snare to exist thereon. If, however, he gives but a

bare license or permission to cross his premises, the licensee takes the risk of accidents in using the premises in the condition in which they then are. *Beck v. Carter*, 68 N. Y. 292; *Corby v. Hill*, 4 C. B. (N. S.) 556; *Hounsell v. Smyth*, 7 id. 731. Where a railroad had permitted the use of a crossing and a vacant space near, for the purpose of loading and unloading cars, it was held that they must so use their tracks as not to endanger personal safety. *Kay v. Penn. Railroad*, 65 Penn. St. 269; 3 Am. Rep. 628. If the licensee fails to observe the limits of his license, either by acts of enjoyment after its expiration or by acts beyond its scope, as to all such matters, it is no justification for him, and he is a mere trespasser. *Kissecker v. Monn*, 36 Penn. St. 313; *Glynn v. George*, 20 N. H. 114; *Stone v. Knapp*, 29 Vt. 501. If a license is given to construct a way, the licensor may forbid its use if constructed on a different location. *Dempsey v. Kipp*, 62 Barb. 311. One holding even an irrevocable license cannot enter by force. *Churchill v. Hulbert*, 110 Mass. 42; 14 Am. Rep. 578; *contra*, *Sterling v. Warden*, 51 N. H. 217; *Blades v. Higgs*, 10 C. B. (N. S.) 713.

§ 7. **Revocable.** If the parties upon the revocation of a license will be in the same position as before it was given, it may be laid down as a universal rule that the license is revocable at the pleasure of the licensor. *Wingard v. Tift*, 24 Ga. 179; *Hetfield v. Central Railroad*, 5 Dutch. (N. J.) 571. Such are the cases of licenses to fish or hunt, to use a carriage-way or other path, to use running water (*Allen v. Fiske*, 42 Vt. 462); to flood land or have a right of eaves drip (*Tanner v. Volentine*, 75 Ill. 624); to enter and attend a place of amusement (*Burton v. Scherpf*, 1 Allen [Mass.], 133; *Coleman v. Foster*, 1 Hurlst. & N. 37); to use a business name under which the seller of the good-will and fixtures had dealt (*Howe v. Searing*, 6 Bosw. 354), and other rights of a like nature. *Sampson v. Burnside*, 13 N. H. 264; *Liggins v. Inge*, 7 Bing. 682; *Wood v. Leadbitter*, 13 M. & W. 838. It is immaterial how formally the right may have been given, even by deed. A license under seal, provided it is a mere license in its legal effect, is as revocable as a license by parol and, on the other hand, a license by parol coupled with a grant is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license coupled with a grant by parol of something incapable of being granted except by deed, there the license is a mere license, it is not an incident to a valid grant and it is therefore revocable. *Wood v. Leadbitter*, 13 M. & W. 838. Thus it was held that a mortgage of chattels with power to enter and seize them is only a revocable license. *Chynoweth v. Tenney*, 10 Wis. 397.

But it would seem that in this case the license was coupled with an interest and so irrevocable. *McNeal v. Emerson*, 15 Gray (Mass.), 384. "If, however, the situation of the parties has been changed on the faith of the license and expense has been incurred, the license being granted on good consideration, the courts differ as to the effect of an attempted revocation. The cases where such license is held irrevocable are given in the next section. Even where in enjoying the license, there has been an expenditure of money, the license is revocable so far as any future enjoyment is concerned or so far as it remains unexecuted. *Houston v. Laffee*, 46 N. H. 507; *Ruggles v. Lesure*, 24 Pick. (Mass.) 187; *Hall v. Chaffee*, 13 Vt. 150; *Prince v. Case*, 10 Conn. 375. Where a license is to be enjoyed and the acts performed upon the land of the licensor and are such as, if granted, by deed would be an easement the license may be revoked as to any future acts, though the licensee may have expended labor and money upon the premises. Thus where the license was to lay an aqueduct across the licensor's land, he may revoke the license and cut the pipe (*Owen v. Field*, 12 Allen [Mass.], 457; *Selden v. D. & H. Canal Co.*, 29 N. Y. 639), but perhaps the licensee might recover for any unnecessary or malicious injury to the pipe which would still remain his property. *Houston v. Laffee*, 46 N. H. 507. Where the license was to construct a culvert on the licensee's land and thereby turn water upon land of the licensor, it was held revocable. *Foot v. N. A. & N. Co.*, 23 Conn. 223. So to build a dam on the licensor's land (*Mumford v. Whitney*, 15 Wend. 380; *Trammel v. Trammel*, 11 Rich. [So. Car.] L. 474), or to flow the licensor's land (*Hazelton v. Putnam*, 3 Chand. [Wis.] 117; *Bridges v. Purcell*, 1 Dev. & B. [N. C.] L. 492; *Woodward v. Seely*, 11 Ill. 157); or to build a house upon the licensor's land, whether the revocation is before or after the building is completed (*Jamieson v. Millemann*, 3 Duer [N. Y.], 255; *Prince v. Case*, 10 Conn. 375; *Bachelder v. Wakefield*, 8 Cush. [Mass.] 243; *Harris v. Gillingham*, 6 N. H. 9; *Collins Co. v. Marcy*, 25 Conn. 239), or to use a way, though it has been constructed at expense by the licensee (*Ex parte Colum*, 1 Cow. 568; *Foster v. Browning*, 4 R. I. 47; *Kimball v. Yates*, 14 Ill. 464; *Wallis v. Harrison*, 4 M. & W. 538), or to enter and excavate the land of the licensor for minerals under which large expenses had been incurred. *Desloge v. Pearce*, 38 Mo. 588; *McCrea v. Tash*, 12 Gray (Mass.), 121. Even with courts which hold that a license may become irrevocable where executed the payment of a consideration alone will not be enough to produce this effect, where one owner of land gave another a license to flow in consideration that the other allowed him to enter and cut trees, the

agreements are not dependent and either may be revoked without giving up the other. *Dodge v. McClintock*, 47 N. H. 383.

A parol license to enter upon land "at any and all times," and cut and carry away growing wood, must be acted upon within a reasonable time, and if not acted upon within a period of more than three years, may be revoked. *Hill v. Hill*, 113 Mass. 103; 18 Am. Rep. 455; *Sterling v. Warden*, 51 N. H. 217; 12 Am. Rep. 80.

Where the owners and occupants of adjoining farms have been accustomed to let their cattle pasture in common on such lands, this is a mere license, and either of them may give the other a notice of revocation, after which time the entry of the cattle of the other party upon his lands will be an actionable trespass. *Stone v. Wait*, 50 Vt. 663.

Where a building has been erected under circumstances which would make a license to maintain it irrevocable, if it is torn or blown down, the license may then be revoked. *Veghte v. Raritan Co.*, 4 Green (N. J. Eq.) 142. If the licensor expressly refused to give any larger or more permanent title the licensee cannot complain of a revocation, though he loses heavily by it, or though he has made large expenditures in preparation for its enjoyment. *Wood v. Edes*, 2 Allen (Mass.), 578. The license may be revoked, not only by express words, but also by any act of the licensor inconsistent with its further enjoyment, as, for instance, by a conveyance or lease of the property to which it relates. *Whitaker v. Cawthorne*, 3 Dev. (No. Car.) 389; *Carter v. Harlan*, 6 Md. 20; *Houx v. Seat*, 26 Mo. 178; *Kamphouse v. Gaffner*, 73 Ill. 453. It makes no difference that the grantee had notice of the license. *Drake v. Wells*, 11 Allen (Mass.), 141. It is revoked by the death of the licensor or of the licensee. *Eggleston v. N. Y. R. R.*, 35 Barb. 162.

Where a license has been revoked after the expenditure of money by the licensee and contrary to the terms of the license, the cases are not agreed as to the remedy of the licensee, whether it is an action at law to recover for the breach of the contract, or in equity for specific performance. *Houston v. Laffee*, 46 N. H. 508. But equity will not allow the owner of the land to avail himself of improvements made by the licensee, without restoring the licensee to as good a situation as he stood before. *Hazelton v. Putnam*, 3 Chand. (Wis.) 117; Story's Eq., § 1237. And where, by such revocation, the structure erected by the licensee, upon the licensor's land, becomes personal property, as in case of a house erected under the license, the licensee has an interest in it, and a right to remove it in a reasonable time. *Barnes v. Barnes*, 6 Vt. 388; *Ashmun v. Williams*, 8 Pick. (Mass.) 402. Whether the licensor can compel a restoration of the premises to their former state

depends on circumstances. *Prince v. Case*, 10 Conn. 375; *post*, p. 212. The licensee is not responsible for any acts done before revocation, and so far as they have affected the land, the licensor must restore it at his own expense. But if any thing has been done since the revocation, the expense of removal falls on the licensee. *Stevens v. Stevens*, 11 Mete. (Mass.) 251. If the revocation involves any removal of property or restoration of the previous condition of the premises, the licensee must be allowed a reasonable time before he can be treated as a trespasser. *Lloyd v. Bellis*, 37 E. L. & E. 545. As, for example, a license to place articles on the land of another. *Mellor v. Watkins*, L. R., 9 Q. B. 400 (9 Eng. 344). To stack timber on a wharf. *Cornish v. Stubbs*, L. R., 5 C. P. 334. To use a ditch. *Carter v. Page*, 4 Ired. (No. Car.) L. 424. The licensee is entitled to some evidence of the authority of the person who forbids him to exercise his privilege, if it is not the licensor in person. Thus, where a husband told his wife to forbid persons hunting on his land during his absence, and she ordered off one to whom he had given a license, but did not disclose her authority nor did he know it, the licensee is not liable as a trespasser. *Kellogg v. Robinson*, 32 Conn. 335.

§ 8. **When irrevocable.** Where a license is coupled with an interest, it is generally irrevocable (*Snowden v. Wilas*, 19 Ind. 10; *Miller v. State*, 39 Ind. 267; *Silsby v. Trotter*, 29 N. J. Eq. 228); or, when necessary to the enjoyment or possession of a title or right arising under the act or contract of the person who creates it (*Watson v. King*, 4 Camp. 272; *Gaussen v. Morton*, 10 B. & C. 731; *Beatie v. Butler*, 21 Mo. 313; *Muskett v. Hill*, 5 Bing. N. C. 694; *Congreve v. Evetts*, 10 Exch. 298; it is irrevocable, as, for instance, where the license is directly connected with the title to personal property, which the licensee acquires from the licensor at the time the license is given. Thus, the seller of chattels must allow the purchaser a reasonable time to remove them after sale, and cannot within that time forbid the purchaser to enter and take them. *Nettleton v. Sikes*, 8 Mete. (Mass.) 34; *Wood v. Manley*, 11 Ad. & E. 34; *Parsons v. Camp*, 11 Conn. 525.

Where a person has cut hay on shares and stored it in the barn on the premises, his right to enter and remove it is irrevocable. *White v. Elwell*, 48 Me. 360; *Long v. Buchanan*, 27 Md. 502.

So of a license to cut trees, which cannot be revoked so as to deprive the licensee of wood already cut, but as to standing wood it may. *Drake v. Wells*, 11 Allen (Mass.), 143; *Westcott v. Delano*, 20 Wis. 514; *Roffey v. Henderson*, 17 Q. B. 586. In *Wood v. Leadbitter*, 13 M. & W. 843, it is said a mere license is revocable, but that which is called a license is often something more than a license; it often comprises or

is connected with a grant, and then the party who has given it cannot, in general, revoke it so as to defeat his grant, to which it was incident. *Thomas v. Lovell*, Vaugh. 331. A license coupled with an interest is where the party obtaining a license to do a thing also acquires the right to do it; in such case the authority conferred is not merely a permission, it amounts to a grant, and it may be assigned to a third person. 2 Bouv. Inst. 568; *Wood v. Leadbitter*, 13 M. & W. 838. It is not essential that the interest should be in the thing to which the right given relates, or on which it is to be exercised. All that is necessary is that the licensor should have conferred, or that the licensee should possess some estate or interest which depends on the continuance of the license, and cannot be enjoyed if it is terminated. It is not necessary that it should be an absolute interest. *Boults v. Mitchell*, 15 Penn. St. 371. In such case, however, the license will stand or fall with the interest to which it is appurtenant. Where there is a license by parol coupled with a parol grant or pretended grant of something which is incapable of being granted, otherwise than by deed, the license is a mere license and is not incident to a valid grant and is, therefore, revocable. *Wood v. Leadbitter*, 13 M. & W. 837. Where the licensee, on the faith of the license, has made improvements on his own land, which depend for their enjoyment on rights affecting land of the licensor, the latter cannot revoke the license. *Raritan Co. v. Veghte*, 21 N. J. Eq. 463. If the act licensed is to be done on the licensee's land, and the only effect of it is to impair or destroy an easement appurtenant to the licensee's land, which that, as the dominant estate, has possessed in the land of the licensee, as the servient estate, the license is irrevocable when executed. *Taylor v. Hampton*, 4 McCord's (So. Car.) L. 96; *Corning v. Gould*, 16 Wend. 531. Thus, where parol permission was given to erect buildings which would darken ancient windows of the licensor, he cannot revoke his license after the buildings have been constructed and demand their demolition. *Winter v. Brockwell*, 8 East, 308. So, where a license was given to erect a dam which restricted the licensee's power of flowage (*Morse v. Copeland*, 2 Gray [Mass.], 302); or to lower the bank of a stream and put in a weir, the effect of which was to divert the water from the licensee's mill below. *Liggins v. Inge*, 7 Bing. 682; *Addison v. Hack*, 2 Gill (Md.), 221. But, if in order to enjoy the license, it is necessary to exercise a right of easement by using the licensor's land, the license is irrevocable. In one case the act done extinguishes what the licensor had previously enjoyed in the estate of another. In the other, in order to enjoy the license, the licensee must occupy the land of the licensor. *Morse v. Copeland*, 2 Gray (Mass.), 302. And upon

the decay or destruction of the works on the licensee's land it would seem that the easement would revive. *Dyer v. Sanford*, 9 Metc. Mass.) 395; *ante*, pp. 202, 203, 204, 205.

Where an attempt is made to set up an irrevocable license the intent of the parties is most material. It must appear that it was the understanding that it was not to be revoked. It should also be shown not only that the mind of the party was directed to the particular act which he sanctioned, but to all its consequences, for if these are injurious in their nature and such as were not originally foreseen or contemplated, he may have a right to withdraw an assent by which he would otherwise be bound. *Bell v. Elliott*, 5 Blackf. (Ind.) 113; *Bridges v. Blanchard*, 1 A. & E. 536. Almost all the cases of irrevocable license rest upon the injustice and hardship of a revocation, and therefore cannot extend to cases where the injustice would be to the licensor. But in *Hodgson v. Jeffries*, 52 Ind. 334, a license to dig a ditch which would discharge the drainage of the licensee's land, over the licensor's land, was held irrevocable, though unforeseen damages resulted. If it appears that the parties really contemplated a strict legal license, no court of law or equity will give the licensee any greater rights whatever he may have done, for that would be to allow one party to change a contract without the consent of the other. Thus where it appeared that the licensor expressly refused to give any greater right than a bare license, the license is revocable, though it may involve the licensee in great loss. *Wood v. Edes*, 2 Allen (Mass.), 578. Where it is apparent that a more permanent right was intended and the failure to execute proper deeds was through ignorance or mistake, and not by intention; thus where a parol license is given to use a party wall (*Russell v. Hubbard*, 59 Ill. 335); or to rest the end of a bridge upon the licensee's land (*Ameriscoggin Bridge v. Bragg*, 11 N. H. 102), it must be presumed that a permanent right was contemplated and after part performance, a court of equity will enforce the contract according to the intention of the parties, if the performance was on the faith of the license and the license was founded on a good consideration. *Stephens v. Benson*, 19 Ind. 367; *Rhodes v. Otis*, 33 Ala. 578; *Wilson v. Chalfant*, 15 Ohio, 248.

Where a license has been given to enter upon the licensee's land and do acts which involve the expenditure of money and the license becomes executed by an expenditure under it, it is either irrevocable (*Cumberland Valley Railroad v. McLanahan*, 59 Penn. St. 23), or cannot be revoked without remuneration, on the ground that a revocation under such circumstances, without at least recompensing the licensee for permanent benefits received by the licensor, would be un-

conscionable and work a fraud (*Miller v. Tobie*, 41 N. H. 86), and such expenditure made upon the faith of a license may operate as an estoppel which will prevent a revocation. *Lane v. Miller*, 27 Ind. 534. Thus a license to flow is revocable after the dam is built. *Cook v. Pridgen*, 45 Ga. 331; 12 Am. Rep. 582. So of a license to use a party wall. *Russell v. Hubbard*, 59 Ill. 335. In *Stephens v. Benson*, 19 Ind. 367, the other element is added that an adequate compensation in damages could be recovered for the injury done by such revocation. The doctrines stated in this section are adopted by the courts in the cases of *Rerick v. Kern*, 14 S. & R. (Penn.) 267; *Thompson v. McElarney*, 82 Penn. St. 174; *Rhodes v. Otis*, 33 Ala. 578; *Addison v. Hack*, 2 Gill (Md.), 221; *Wilson v. Chalfant*, 15 Ohio, 248; *Beatty v. Gregory*, 17 Iowa, 114; *Fuhr v. Dean*, 26 Mo. 116; *Snowden v. Wilas*, 19 Ind. 14; *Cook v. Pridgen*, 45 Ga. 331; 12 Am. Rep. 582; *Russell v. Hubbard*, 59 Ill. 335; *Bartlett v. Prescott*, 41 N. H. 493. In other States the soundness of these decisions is denied, as we have seen in the preceding § 7, *ante*, p. 205. In cases of irrevocable licenses, grantees of the lands affected are bound by the license, if they took the premises with notice. *Pope v. Henry*, 24 Vt. 560. Whether possession alone is notice, is doubtful, and would probably depend on its nature and the surrounding circumstances, and be a question for the jury. *Prince v. Case*, 10 Conn. 375; *Pope v. Henry*, 24 Vt. 560.

§ 9. **Executed license as a defense.** As to all acts which would in their nature have been trespasses, if not licensed, and which were committed during the existence of the license and before its revocation, the license is a complete justification. *Cook v. Stearns*, 11 Mass. 538; *Jamieson v. Millemann*, 3 Duer, 255; *Selden v. Delaware Canal*, 29 N. Y. 634; *Owens v. Lewis*, 46 Ind. 489; 15 Am. Rep. 295; *New Orleans Co. v. Moya*, 39 Miss. 374. Thus, a license to build a railroad across land, protects those who enter under it and dig up the ground. *Miller v. Auburn & Syracuse Railroad*, 6 Hill, 64. A license to enter and remove manure, protects the person licensed in such entry. *Parsons v. Camp*, 11 Conn. 525. It extends even farther and protects him in acts after the revocation. Thus, where a vessel is moored to a wharf under a license, the revocation cannot make unlawful such acts as are necessary to remove her to some other place of safety. *Heaney v. Heaney*, 2 Denio, 625. Where the license was to cut wood, it protected the licensee in entering after revocation and removing wood already cut. *Giles v. Simonds*, 15 Gray (Mass.), 441. Where, under the license, the licensee had placed chattels upon the licensor's land, he has a reasonable time after revocation to enter and remove them. *Mellor v. Watkins*, L. R., 9 Q. B. 400 (9 Eng. 344); *Cornish v. Stubbs*, L. R., 5 C. P. 334.

In these cases the subsequent acts are a necessary part of what has been before done, and the justification covers both. It covers all acts done before revocation, and their proper and necessary consequences. If the licensee during his enjoyment has erected structures on or disturbed the land of the licensor, it would seem he owes him no duty to remove such structures or replace the ground. If he has erected structures upon his own land, the licensor has no concern with them, and can complain of them only so far as they cause active injury to his land, as by flowage or by obstructing some easement which still belongs to him. *Foot v. New Haven Co.*, 23 Conn. 214; *Bridges v. Purcell*, 1 Dev. & B. (No. Car.) 492; *Clement v. Durgin*, 5 Me. 9; *Woodbury v. Parshley*, 7 N. H. 237; *ante*, p. 208.

§10. **Who may grant.** The authority upon which the licensee relies for the justification of his acts must come from a competent source. Of course no man can grant an authority which will interfere with the rights of others. The test would seem to be in general that the acts licensed must be such as the licensor himself could rightfully do. Thus, a license given by the owner to a plank road company, to build a road across a lot, has no force if he has before leased the property. *Brown v. Powell*, 25 Penn. St. 229. The lessee of part of a house with a right to "the improvement of all the homestead land, cannot grant a license to a stranger to pass over the land against the will of the lessor." *Richardson v. Richardson*, 9 Gray (Mass.), 213. The tenant has a right of way to whatever extent it should be found needful for the complete enjoyment of the leasehold premises, and this includes, of course, an authority to grant a license for the use of it in common with himself to all persons whom he employs or supports on the premises, or who have any lawful occasion to resort to the place or hold communication with any persons resident there. But this is the limit of the right, and he cannot enlarge it nor confer upon others any of the privileges which the lease secures only to him, nor enlarge a private way set apart and appropriated by the plaintiff exclusively to the convenient occupation and improvement of her own estate into a thoroughfare for strangers or adjoining proprietors. A necessary implication in many cases confers upon a man's servants and the members of his family especially, in his absence, the right to invite upon his premises others for purposes of business, but such implication cannot extend to licenses of any important or permanent nature. Thus, where a married woman, purchasing furniture, gave an agreement that in case of failure to pay the price the seller might enter any building where it was, forcibly if necessary, and retake it, it was held that such license gave the seller no right to enter her husband's premises,

he not having ratified the agreement. *Nelson v. Garey*, 114 Mass. 418. A wife cannot grant a valid license to a person to enter upon her husband's lands, or into his house or buildings. Vol. 3, p. 654. Other cases where the right of a party is too small to support a license given by him, are those of persons holding easements. Thus a person who has a right of way for himself cannot license his servants to use it. If it is for himself and his servants, his license to a stranger to use it would be null and void. If it is a limited easement as to use a way on foot he cannot license another to use it with carriages. *Atkins v. Bordman*, 2 Metc. 466; *Allan v. Gomme*, 11 Ad. & E. 759; *Bartlett v. Prescott*, 41 N. H. 493. No person can grant a license to do acts upon land if he has not some estate in the land, such as a fee, a tenancy, or an easement. A person who is himself there by license or a trespasser can give no right. If the estate of the licensor is a limited one, as a lease, a life tenancy, or an estate upon condition, he cannot give any license which will protect the licensee after such estate has terminated.

§ 11. **Against whom enforced.** As a license amounts to a power or authority to do the acts licensed, the licensee as against all strangers has all the rights of the licensor and may hold them responsible for any interference with the enjoyment of the privilege given him (*Sawyer v. Wilson*, 61 Me. 529), but a stranger could take advantage of any revocation as a defense to such suit. If the license is coupled with an interest however, it gives the licensee a right which he can enforce against the licensor as well as against every one else. In many cases where a license has become irrevocable as against the licensee it may be of no force as against his grantee, for under the registry laws a purchaser without notice is protected. *Prince v. Case*, 10 Conn. 375; *Stephens v. Benson*, 19 Ind. 367. What would be notice would be a question for the jury and depend on the circumstances of the case. Where a licensee had built a house on the faith of the license he was held entitled to protection against a purchaser who had no notice of his rights except the fact that the licensee was in possession. *Pope v. Henry*, 24 Vt. 560. This however could only apply to licenses where the enjoyment creates a visible incumbrance upon the property. *Prince v. Case*, 10 Conn. 375. A man may stand by operation of law on the position of licensor without his knowledge or even against his consent as where the property of another is thrown upon his land by the forces of nature. *Proctor v. Adams*, 113 Mass. 376; 18 Am. Rep. 500. A license may also be indirectly enforced in some cases. Thus a parol license may excuse the non-performance of a contract under seal. *Longworthy v. Smith*, 2 Wend. 587; *Leavitt v. Savage*, 16 Me. 72; *Franklin Ins. Co.*

v. Hamill, 5 Md. 170 ; *Stickney v. Stickney*, 21 N. H. 61 ; *contra, West v. Blakeway*, 2 M. & G. 729. So, the party to an instrument under seal cannot make a breach, committed by the other party by his license, an excuse for his own refusal to perform. *French v. New*, 20 Barb. 481 ; *Jewell v. Blandford*, 7 Dana (Ky.), 472 ; *Smith v. Edmunds*, 16 Vt. 687 ; *ante*, p. 195, § 1. And the same result would follow if he has without reservation accepted a modified performance of the contract. *McCombs v. McKennan*, 2 Watts & S. (Penn.) 216. It must, however, in order to be a defense, be pleaded. *Crabs v. Fetick*, 7 Blackf. (Ind.) 373 ; *Snowden v. Wilas*, 19 Ind. 10 ; *Chase v. Long*, 44 Ind. 427. Otherwise, evidence of a license will only avail the licensee in mitigation of damages. *Hamilton v. Windolf*, 36 Md. 301 ; 11 Am. Rep. 491.

§ 12. **Extinguishment.** A license, as we have seen, *ante*, p. 195, § 1, bears a close resemblance in the mode of its exercise to an easement, and is liable to be extinguished in the same modes. Beside the termination of the right by revocation, express or implied by law, the right may expire by its own limitation. It may be extinguished by a merger. Thus, where a license is given to use a way to reach land of the licensee, unity of title will extinguish the license. So, where the license is to enter land of the licensor to remove personal property belonging to the licensee, if he sells the chattels to the licensor, the license is merged. In such case it might also be extinguished by a destruction of the goods. So, where the license was to erect a dam or a house on or affecting land of the licensor, the right has been held to cease with the decay or destruction of such structure. *Wingard v. Tift*, 24 Ga. 179 ; *Cowles v. Kidder*, 24 N. H. 364 ; *ante*, pp. 202, 205. It would be extinguished by any act of the licensee inconsistent with its exercise. Thus, if having a license of way he erects some permanent structure or barrier across the path upon which the license was to be enjoyed, it would terminate the license. It would also be extinguished by abandonment, where the licensee failed to exercise his privilege within a reasonable time. *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120.

CHAPTER XL.

LIEN.

ARTICLE I.

OF LIEN AS A DEFENSE.

Section 1. Definition and nature. A lien is the right to hold possession of another's property for the satisfaction of some charge upon it. It is founded in a lawful possession, to which the law adds a right of continuance until some demand arising in relation to that specific property is satisfied. *Moss v. Townsend*, 1 Bulst. 207; *Oakes v. Moore*, 24 Me. 214; *Hamlett v. Tallman*, 30 Ark. 505; *McCaffrey v. Wooden*, 65 N. Y. (20 Sick) 459; 22 Am. Rep. 644. The lien of a mechanic or manufacturer is a simple right of retainer personal to the party in whom it exists, and not assignable or attachable as the personal property or a chose in action of the party entitled to it. The lien in such cases is a mere passive lien or right of retainer, and gives no right to sell or transfer the property, except in the form and by the proceedings fixed by statute. *Lovett v. Brown*, 40 N. H. 511; *Doane v. Russell*, 3 Gray (Mass.), 382; *Leg v. Evans*, 6 M. & W. 36; *Sullivan v. Park*, 33 Me. 438; *Jones v. Pearle*, 1 Strange, 556; *Fox v. McGregor*, 11 Barb. 41; *Case v. Fogg*, 46 Mo. 44; *Meany v. Head*, 1 Mas. (U. S.) 319. It is a mere incident to the contract under which the lien arises, and no part of it, when given by statute, and therefore may be taken away by subsequent legislation. *Frost v. Ilsley*, 54 Me. 345; *Martin v. Hewitt*, 44 Ala. 418. The lien, as above defined, is the common-law lien, which has since been extended in equity, and by statute, to other cases. A like lien may also arise by the contract of the parties, either express or as evidenced by usage. The common-law lien covered the cases of tradesmen, carriers, innkeepers, farriers and mechanics and other bailees, and, in another class, vendors, salvors and persons holding property by virtue of legal process.

Where the lien is one given for labor done on the property, it must appear that the workman has done some work and conferred some additional value upon the property, either by the exertion of his own skill, or by some instrument in his possession. *Judson v. Etheridge*,

1 C. & M. 743; *Sanderson v. Bell*, 2 C. & M. 311. Liens have been created by statute in favor of log-drivers, mechanics, builders of houses, mutual insurance companies, judgment creditors, and the like. When created by common law, by usage or by express contract, they cannot exist without possession or its equivalent, as against creditors or vendors of the general owner. The lien may be a general one or a particular one. The former is a claim to hold the property for all indebtedness of the owner, or at least for a larger sum than is due with reference to that specific property. A particular lien is a claim only for what is due with reference to the property held. The latter is good against every one. The former, in many cases, only against the owner. There is also an equitable lien in favor of the vendor of real estate recognized in England and in some of our States, but denied in others. The lien, if arising from a contract, is to be sustained or disallowed and to be defined according to the law of the place of such contract. Story on Conf. of Laws, 267.

Even where the lien does not arise directly from contract, but from local law, as in case of an attorney's lien, its extent will be determined in another jurisdiction by that law. *Citizens' Bank v. Culver*, 54 N. H. 327; 20 Am. Rep. 134. For a further discussion of the general principles of lien, see Vol. IV, page 315, chapter XC, Lien; Vol. I, page 65, § 3, Lien; page 273, art. XII, Agents; page 453, § 4, Attorneys; Vol. II, page 60, § 2, Carriers; page 161, § 7, Charter-party; page 526, § 6, Deposit; Vol. III, page 148, Equity; page 301, § 14, Factors; page 411, § 5, Foreclosure; page 427, title V, Foreclosure of Liens; Vol. IV, page 9, §§ 1, 3, Innkeepers; Vol. V, page 24, Officer; page 321, § 10, Railroads; page 724, art. XIII, page 684, § 19, Shipping; page 620, § 7, Sales.

§ 2. **When a lien operates as a defense.** A lien while it continues in force gives a perfect right of possession against all the world, including the general owner. It is a defense to the lien-holder for all acts done by him in maintaining his possession or in recovering it, if he has been unlawfully deprived of it. If his possession is lost by fraud or force or generally against his will, his lien is not gone. *Grinnell v. Cook*, 3 Hill, 493; *Wallace v. Woodgate*, R. & M. 193. When established as valid in any particular case, it is a complete defense against any action of trespass or replevin brought by the owner (*Coit v. Wapples*, 1 Minn. 134; *Doane v. Russell*, 3 Gray [Mass.], 384); or by any person holding a subsequent mortgage, lien or other incumbrance to which he is not either expressly or impliedly a party. *Gafford v. Stearns*, 51 Ala. 434.

In the absence of any license to do so from the owner, the holder of the lien cannot, in general, use the property. *Lawrence v. Maxwell*,

53 N. Y. (8 Sick.) 19. But where the lien arises by contract and the keeping is an expense to him and the use is not injurious to the property, he may use the property as the owner would, but it will be at his own risk; for instance, he may milk a cow or ride a horse. *Thompson v. Patrick*, 4 Watts (Penn.), 414; *Ree v. Carding*, 1 Nev. & M. 35; *Coggs v. Barnard*, 2 Ld. Raym. 909. If, however, the lien is created by statute and not by contract, it will not protect him in using the property. *Mores v. Conham*, Owen, 123. Where an action is brought against him for the possession of the goods or for an injury to them, the success of his defense must depend first on the validity of his lien. In some cases he may sustain his lien, although it arises from the act or contract of a wrong-doer and not the true owner. Thus, in England it is held that an innkeeper can retain goods under his lien, even as against the true owner, which were received by him from a thief or a tort-feasor, upon the ground that he is obliged to receive any person who applies for lodging, and with him his goods. *Yorke v. Grenaugh*, 2 Ld. Raym. 866; *Threfall v. Borwick*, L. R., 9 Q. B. 711; S. C., 10 id. 210; 12 Eng. 689; S. C., id. 266; *Black v. Brennan*, 5 Dana (Ky.), 310; *Manning v. Hollenbeck*, 27 Wis. 202. But the American authorities in general do not admit this to be law. *Post*, p. 218, § 3. Where the goods were obtained by false pretenses and then pledged, the pledgee held them, for the title had passed to the pledgor. *Parker v. Patrick*, 5 T. R. 175.

The lien avails, not only against the owner, but in some cases against prior incumbrancers or lien-holders. Thus, the lien of a carrier prevails over the lien of the vendor and consignor, who has stopped the goods *in transitu*. *Oppenheim v. Russell*, 3 B. & P. 42; *Rucker v. Donovan*, 13 Kaus. 251; 19 Am. Rep. 84. But it must appear that there was the consent, express or implied, of such prior incumbrancer. Such lien may also be attacked as founded in an illegal or fraudulent transaction. But a lien acquired under an illegal contract may be good as a defense, if the contract is executed, and the property in the possession of the lien-holder, for the parties being *in pari delicto*, the law will not interfere. *Scarfe v. Morgan*, 4 Mees. & W. 270. If any particular formalities are required by the law as essential to the validity of the principal contract, a compliance with them will be required to sustain the lien which is a mere incident. When the lien has been established as valid at its inception, the claimant of the property may still allege that the lien-holder has forfeited or abandoned his right, or that the acts committed were not within the authority conferred by his lien. Other frauds do not forfeit the lien. Thus, where a warehouseman gave false receipts for grain not stored, he did not forfeit his claim for what was actually

in his possession. *Low v. Martin*, 18 Ill. 286. Mere delay in taking proceedings to enforce an attorney's lien is no waiver though six years expire. *Higgins v. Scott*, 2 Barn. & Ad. 413. A mere change in the form of the indebtedness, with no intention to give up the lien as security for its payment, will not be an abandonment of the lien. *Lewis v. Starke* (10 S. & M.), 18 Miss. 120; *Butts v. Cuthbertson*, 6 Ga. 166; *Muir v. Cross*, 10 B. Monr. (Ky.) 277; *Clark v. Draper*, 19 N. H. 419. Taking other security is not *ipso facto* a waiver. *Schanck v. Arrowsmith*, 9 N. J. Eq. (1 Stockt.) 314. If the lien-holder is induced to give up his possession by fraud or force, he does not lose his lien. *Grinnell v. Cook*, 3 Hill, 493; *Manning v. Hollenbeck*, 27 Wis. 202. And as against the general owner, he may retain a right which will protect him in reclaiming the goods, though he may have voluntarily parted with them, if there was no intention to waive the right. *McFarland v. Wheeler*, 26 Wend. 467; *Allen v. Spencer*, Edm. Sel. Cas. (N. Y.) 117; *Spaulding v. Adams*, 32 Me. 211. Attaching the property on the secured debt is not in itself a waiver. *Palmer v. Tucker*, 45 Me. 316; *Danforth v. Denny*, 25 N. H. 155. See below, § 3. If the lien-holder purchases the goods from the general owner his lien merges, but if the sale is avoided for fraud or any other reason, the right of lien revives. *White v. Gainer*, 2 Bing. 23; *Lord v. Jones*, 24 Me. 439. Where the goods are held as security for a loan, they may be sold, but not otherwise. *Pothonier v. Dawson*, 1 Holt, 383; *Walter v. Smith*, 5 B. & Ald. 439; *Wheeler v. Newbould*, 5 Duer, 29; *Parker v. Brancker*, 22 Pick. (Mass.) 40. A delivery of a part of the goods is no waiver of the lien on the remainder. *Boggs v. Martin*, 13 B. Monr. (Ky.) 239; *Partidge v. Dartmouth College*, 5 N. H. 286; *Miles v. Gorton*, 2 C. & M. 504; *Palmer v. Hand*, 13 Johns. 434. While a carrier holds goods on his lien, his liability as a carrier is suspended. 2 Pars. on Cont. 207.* He can defend his possession until he is paid, not only his debt, but his necessary expenses in the preservation of the property. Story on Bailm., § 306a; *Pickersgill v. Brown*, 7 La. Ann. 298

§ 3. **When it does not operate as a defense.** The claim of lien may fail for want of authority in the person making the contract under which it is claimed. *Daubigny v. Duval*, 5 T. R. 604; *Buxton v. Baughan*, 6 C. P. 674. Thus it was held that a mortgagor of horses could not so intrust them to a stablekeeper as to create a lien valid against the mortgagee, though of course it would have protected the stablekeeper against any one claiming under any other title. *Sargent v. Usher*, 55 N. H. 287; 20 Am. Rep. 208. So, an innkeeper has no lien on the property of the wife under a contract with her husband. *McIlwaine v. Hilton*, 7 Hun (N. Y.), 594. A common carrier cannot

acquire a lien of greater extent than that of his employer. *Gilson v. Gwinn*, 107 Mass. 126; 9 Am. Rep. 13. If he receives them without the consent, express or implied, of the owner, as from a bailee, he cannot hold them for his charges. *Robinson v. Baker*, 5 Cush. (Mass.) 137; *Fitch v. Newberry*, 1 Doug. (Mich.) 1. Thus, neither a sub-contractor nor a servant could impose a lien upon property, nor can they claim possession of it under any lien unless it is one expressly given to them by statute. *Jacobs v. Knapp*, 50 N. H. 71. An innkeeper has no lien as against the true owner upon goods in the possession of his guest which are owned by a third party, unless there be charges upon the specific article for which the lien is claimed. *Domestic Sewing Machine Co. v. Watters*, 50 Ga. 573. *Contra*, *Manning v. Hollenbeck*, 27 Wis. 202; *Snead v. Watkins*, 1 C. B. (N. S.) 267. If the person who relies upon the lien as his defense fails to establish the contract under which it arises, he is, of course, defeated. As, for instance, where it appears that he holds adversely. *Allen v. Oyden*, 1 Wash. (U. S.) 174. He must connect the lien with the particular property in question. A banker was not allowed to retain goods deposited with him as a gratuitous bailee, in addition to the securities actually pledged to him. *Leese v. Martin*, L. R., 17 Eq. Cas. 224 (7 Eng. 786); *Neponset Bank v. Leland*, 5 Metc. (Mass.) 259. He cannot sustain his lien if he has failed to perform the contract on which it rests. *Hodgdon v. Waldron*, 9 N. H. 66. Nor if he must himself set up and rely upon an illegal contract. *Fergusson v. Norman*, 5 Bing. N. C. 76; *Strong v. Hart*, 6 B. & C. 160. He may enforce his lien by an authorized sale. *Jarvis v. Rogers*, 15 Mass. 389; *Holly v. Huggeford*, 8 Pick. (Mass.) 73; *Case v. Fogg*, 46 Mo. 44; *Rodgers v. Grothe*, 58 Penn. St. 414; *Whitlock v. Heard*, 13 Ala. 776. As to its use, See Vol. 4, p. 328. A bailee who is employed to run timber to market, and who wrongfully sells it on the way, can claim no lien against the owner for his hire and expenses. *Davis v. Bigler*, 62 Penn. St. 242; 1 Am. Rep. 393. Even if the keeping is attended with expense he cannot justify a sale, except under the forms provided by statute. *Hunt v. Haskell*, 24 Me. 339; *Chase v. Westmore*, 5 M. & S. 185; *Fox v. McGregor*, 11 Barb. 41; *Lecky v. McDermott*, 8 S. & R. 500; *Crumbacker v. Tucker*, 4 Eng. (Ark.) 365. The holder of the lien will be liable for any improper or wrongful use of the property. Thus, where stock is transferred to him as collateral, he cannot transfer it in payment of or in pledge for his own debt. *Fay v. Gray*, 124 Mass. 500; *Graham v. Dyster*, 6 M. & S. 1. His lien will not protect an innkeeper in an attempt to detain the person of his guest (*Sunbolff v. Alford*, 3 M. & W. 248; S. C., 1 H. & H. 13); nor has he any right to the clothes on the person of such guest

as security. *Bumpus v. Maynard*, 38 Barb. 626. If a carrier carry goods to a wrong place, it is a wrongful act and he can assert no lien. *Bernal v. Pym*, 1 Gale, 17. Except in certain cases of statute lien the person justifying under the lien must prove that the possession of the goods was delivered to him. *Grant v. Whitwell*, 9 Iowa, 152; *Beall v. White*, 94 U.S. 382. If he acquired such possession at a later time for any other purpose, or by wrong or misrepresentation, he cannot hold it. *Mudden v. Kempster*, 1 Camp. 12; *Lempriere v. Pasley*, 2 T. R. 485; *Bruce v. Wait*, 3 M. & W. 15; *Bank of Rochester v. Jones*, 4 N. Y. 497. Where the contract under which they came into his possession is inconsistent with his lien, he can claim none. *Taylor v. Robinson*, 8 Taunt. 648; *Gray v. Wilson*, 9 Watts (Penn.), 512; *Randel v. Brown*, 2 How. (U.S.) 406; *Trust v. Pirsson*, 1 Hilt. (N. Y.) 292. Though it is proved that the lien once had a valid existence, it may have been lost or may have terminated and be no longer a defense. The ordinary termination would be the payment of the claim (*Kennedy v. Jones*, 67 Me. 538), or performance of the duty which it secures. But a tender of performance is enough to put the holder of the property in the wrong and make him liable for a conversion. *Parks v. Hall*, 2 Pick. (Mass.) 206; *Walter v. Smith*, 5 B. & Ald. 439.

A person may waive his lien or estop himself from setting it up, by any conduct inconsistent with its existence. He cannot hold the property for any other claim. If he refuses to deliver the property without settling up his lien. *Dows v. Morewood*, 10 Barb. 183; *Thatcher v. Harlan*, 2 Honst. (Del.) 178; *Hanna v. Phelps*, 7 Ind. 21. If he claims to retain it on other grounds (*Mexal v. Dearborn*, 12 Gray, 336; *Boardman v. Sill*, 1 Camp. 410; *Winter v. Coit*, 7 N. Y. 288), or for a larger sum than is due, as for a general balance when his lien is for a particular debt (*Scarfe v. Morgan*, 4 Mees. & W. 270; S. C., 1 H. & H. 292; *Jones v. Tarleton*, 9 Mees. & W. 675), or for expenses of keeping when he is only holding it to secure his claim (*British Empire Shipping Co. v. Sones*, 1 E. B. & E. 353; S. C., 8 H. L. Cas. 337; *Crommelin v. N. Y. Railroad*, 10 Bosw. 77; S. C., 1 Abb. Ct. App. 472), he will be held to defend on that ground alone. So, if he claims to retain the goods upon two liens, he must establish both. *Kerford v. Mondell*, 28 L. J. Exch. 303. Where the lien-holder gives credit or takes a promissory note in payment of the sum due him (*Raitt v. Mitchell*, 4 Camp. 146; *Dutton v. N. E. Ins. Co.*, 29 N. H. 153; *Hutchins v. Olcutt*, 4 Vt. 549; *Riddle v. Varnum*, 20 Pick. (Mass.) 280; *McEwan v. Smith*, 2 H. L. Cas. 309; *S. W. Freight Co. v. Stanard*, 44 Mo. 71; *Milliken v. Warren*, 57 Me. 46; *East v. Ferguson*, 59 Ind. 169), or takes other and distinct security, though it afterward proves worth-

less (*Johnston v. Union Bank*, 37 Miss. 526; *Hewison v. Guthrie*, 2 Bing. N. C. 755), or enters into any special contract inconsistent with the existence of the lien (*Pickett v. Bullock*, 52 N. H. 354; *Spartali v. Benecke*, 10 C. B. 212), or makes an affidavit in getting an order of attachment that he has no lien (*Wingard v. Banning*, 39 Cal. 543), or in general attaches the goods for the debt, or seizes and sells them on execution, he loses his lien. *Jacobs v. Latour*, 5 Bing. 130; S. C., 2 M. & P. 204; *Outcalt v. Durling*, 25 N. J. Law, 443; *Evans v. Warren*, 122 Mass. 303.

The lien-holder may lose his lien by a failure to seasonably take the steps which the statute requires for its preservation. *Bryant v. Warren*, 51 N. H. 213. Where the creditor has a lien upon two funds or parcels of property, and he acts in such a manner as to lose his right upon one, with full knowledge that his debt cannot be satisfied out of the other, without injury to the interest of third persons who have claims upon the second fund, he will in equity be held to have forfeited his right to the second, as against them, by the abandonment of the first. 2 Lead. Cases in Eq. 271. But this is only so where his right to resort to both funds is clear and undisputed, and his remedy is reasonably prompt and efficient, and not where the claim abandoned is a doubtful or disputed one. *Kidder v. Page*, 48 N. H. 382; *Brinkerhoff v. Marvin*, 5 Johns. Ch. 320. An attorney cannot set up his lien upon papers acquired by him in a suit as against the right of other parties in the cause to have them produced. *Vale v. Oppert*, L. R., 10 Ch. App. 340 (12 Eng. 748).

§ 4. **Who may interpose the defense.** Any person against whom an action is brought, in which either the possession of the property, or damages for its use, or for injury to it, are claimed, may set up the defense of lien, provided he is either a party to the contract, a servant or agent of such party, or an assignee of his rights. The party claiming a lien may intrust his possession to others to hold the goods for him as to an agent or warehouseman. *Urquhart v. McIver*, 4 Johns. 103; *Clemson v. Davidson*, 5 Binn (Penn.), 392; *Donald v. Suckling*, L. R., 1 Q. B. 585; *Holbrook v. Wight*, 24 Wend. 169; *Kollock v. Jackson*, 5 Ga. 153. And for them the lien will be as good a defense as for their principal. The lien is not assignable as a separate right, but only with the debt as an incident to it. *Buckner v. McIlroy*, Vol. 4, p. 327. If the assignee has the property, and holds the debt as secured by it, he stands as well as the original lien-holder. *Nash v. Mosher*, 19 Wend. 431; *Macomber v. Parker*, 14 Pick. (Mass.) 497. The lien cannot be set up by a wrong-doer, for instance, one who has got possession of them from the workman and refuses to deliver them, as a defense against a claim by the general owner. *Bradley v. Spofford*, 23

N. H. 444. That a person is a creditor of the owner, gives him no right to retain them. *Allen v. Megguire*, 15 Mass. 490. A mere volunteer, under no obligation of the law, who accepts the temporary custody of goods, without any agreement upon the subject, has no lien for care or trouble. *Rivara v. Ghio*, 3 E. D. Smith, 264. But where one, who has fraudulently obtained goods, pledges them or in any other way gives a lien upon them, the lien-holder may hold, for the title was in the pledgor. *Parker v. Patrick*, 5 T. R. 175. If there has been a sale under the lien, or an attempt to foreclose it, the question of the validity of the lien, and of the proceedings under it, may arise between new parties. If these proceedings have been regular, and their regularity is usually to be determined by reference to statute law, the general owner has lost all claim upon the property, and any subsequent purchaser can defend against him.

§ 5. **How interposed.** At common law the defense of lien must be specially pleaded in the action of detinue. *Phillips v. Robinson*, 4 Bing. 111. But in trespass evidence of a lien could be offered under the general issue (*Richards v. Symons*, 15 Law J. 35); or under a special plea denying title. *Richards v. Symon*, 8 Q. B. 90. Under the Codes it would seem to be necessary to set out the title which the defendant claimed in full, and thus give the plaintiff notice of the real defense to be set up, and also place upon the records of the court the real issues tried in the case. But where the ground of defense is not directly the lien, but some title created under it, this would not be necessary. Thus, if there had been a sale under the lien and the general owner attempts to recover the goods or damages from the immediate or subsequent purchasers, it would be enough for the defendant to plead title generally, as in such case the lien has become an executed right, as a mortgage after a foreclosure is equivalent to a deed.

CHAPTER XLI.

LIMITATIONS, STATUTE OF.

ARTICLE I.

OF THE STATUTE IN GENERAL.

Section 1. Definition and nature. There can be no doubt that parties may by their contract limit the time within which an action shall be commenced in reference to it. Thus, if parties by their contract agree that no suit shall be sustained thereon unless commenced within six months after the cause of action shall accrue, such stipulation will be binding on them; and no action can be maintained on the contract unless commenced within the period therein limited. *North-western Ins. Co. v. Phoenix Oil, etc., Co.*, 31 Penn. St. 448. See, also, *Wilson v. Aetna Ins. Co.*, 27 Vt. 99; *Cray v. Hartford Fire Ins. Co.*, 1 Blatchf. (C. C.) 280; *Amesbury v. Bowditch Mutual Fire Ins. Co.*, 6 Gray, 596; *Ketchum v. Protection Fire Ins. Co.*, 1 Allen (N. B.), 136. The parties to a contract may provide by express stipulation for a shorter limitation to actions thereon than that fixed by the general law. *Wilkinson v. First National Fire Ins. Co.*, 72 N. Y. (27 Sick.) 499. The statute does not run after an adjudication in bankruptcy against the claim of a creditor of the bankrupt, which was not barred by the statute at that time. *Von Sachs v. Kritz*, 72 N. Y. (27 Sick.) 548. But see *contra*, *French v. Lafayette Ins. Co.*, 5 McLean (C. C.), 461. And even at common law, great delay in instituting proceedings might, unless explained, furnish the jury with grounds for presuming that the claim had been satisfied. *Boardman v. DeForest*, 5 Conn. 2; *Rogers v. Judd*, 5 Vt. 236; 2 Chit. on Cont. (11th Am. ed.) 1214. There was not, however, at common law, any fixed or stated time within which an action must be brought (*Williams v. Jones*, 13 East, 449; *Perham v. Raynal*, 2 Bing. 306; *People v. Gilbert*, 18 Johns. 228); and limitations are now created by and derive their authority entirely from statute. *Id.*; *Cray v. Hartford Fire Ins. Co.*, 1 Blatchf. (C. C.) 280. It was not until the twenty-first year of the reign of James I (1623), that any limitation of actions founded upon contract was provided for in England by a positive enactment. In that year the statute of 21 James

I, c. 16, was enacted, providing that such actions should be brought within six years after the cause of action had accrued, "and not after." This statute, with some modifications, has been generally re-enacted in the States of the Union in which the principles of the common law prevail, and forms the basis of most of the existing provisions on the subject in the several States. See 1 Wait's Pr. 49. Indeed, all the American acts appear to have followed the statute of James I, and where any difference is apparent, it is generally verbal, and not substantial. The same object appears to have been sought in all, namely, the repose of society. See *Cook v. Wood*, 1 McCord (So. Car.), 130.

The statute of James, in respect to personal actions, was pronounced to be one of the best of statutes. Lord HOLT, in *Green v. Rivet*, 7 Mod. 12. One of its leading objects was, that the action should be brought to trial at a period of time when the defendant could be prepared with his witnesses to meet the charge, which would not be the case if the action might be postponed to an indefinite period. *Battley v. Faulkner*, 3 B. & Ald. 292. Or, in more general terms, the statute of limitations was intended for the relief and quiet of defendants, and to prevent persons from being harassed, at a distant period of time after the commission of the injury complained of. *Id.* 293. And see *Rhodes v. Smethurst*, 6 M. & W. 351, 356. Withholding merely the remedy, after the lapse of an appointed time, for reasons of private justice and public policy, a statute of limitation is not to be deemed a violation of the sacredness of private rights. *Jones v. Jones*, 8 Ala. 262; *Ogden v. Saunders*, 12 Wheat. 349; *Waltermire v. Westover*, 14 N. Y. (4 Kern.) 16. It is a shield and not a weapon of offense, and so is ineffectual where a party seeks affirmative relief based upon allegations of payment. *Johnson v. Albany, etc., R. R. Co.*, 54 N. Y. (9 Sick.) 416; S. C., 13 Am. Rep. 607. So considered, statutes of limitations have, of late years, been more favorably regarded than formerly by the courts, both in England and in this country. See *McCluney v. Silliman*, 3 Pet. (U. S.) 270. No mere lapse of time after the commencement of an action at law will bar the action under the statute of limitations; the statute can in no case furnish a defense, unless the action was barred before its commencement. *Evans v. Cleveland*, 72 N. Y. (27 Sick.) 486. So no mere lapse of time will absolutely defeat an application for the continuance of such an action in the name of a representative of a deceased party. *Id.* Where courts of equity have concurrent jurisdiction with courts of law, and a party proceeds in equity, if he is barred at law he will be barred in equity; and although the statute of limitations does not, in terms, apply to courts of equity, yet, by analogy, equity will act upon the statute, and refuse relief when

the bar is complete at law *Sloan v. Graham*, 85 Ill. 26; Vol. 3, pp. 197, 198.

§ 2. **Its construction.** Statutes of limitations are now quite generally looked upon as statutes of repose. *Bell v. Morrison*, 1 Pet. (U. S.) 360; *United States v. Wiley*, 11 Wall. 508, 513; *Spring v. Gray*, 5 Mas. (C. C.) 523; *Phillip v. Pope*, 10 B. Monr. (Ky.) 163; *McCarthy v. White*, 21 Cal. 495; *Dickenson v. McCamy*, 5 Ga. 486. They rest upon sound policy, and tend to the peace and welfare of society (*McCluny v. Silliman*, 3 Pet. [U. S.] 270); and they are to be deemed just as essential to the general welfare and the wholesome administration of justice as statutes upon any other subject, and are therefore to be construed with the same favor to effect the legislative intent (*Gautier v. Franklin*, 1 Tex. 732; *Gorman v. Judge of Newaygo Circuit*, 27 Mich. 138); in other words, they are not to be evaded by construction. *Roberts v. Pillow*, Hempst. 624; *United States v. Wilder*, 13 Wall. 251. If the language of the statute is clear and free from ambiguity, it should be applied by the courts, according to what is expressed, although the consequences in the particular case may appear harsh. *Arrowsmith v. Durell*, 21 La. Ann. 295; *Fisher v. Harneden*, Paine (C. C.), 61. It has however been held, that while it is the duty of the courts to enforce statutes of limitations, they are not bound to give them that construction which will operate more prejudicially to those whose remedies and rights are to be forfeited by them, but rather in favor of the right which in all such cases is imperiled. *Elder v. Bradley*, 2 Sneed (Tenn.), 247. So, it is said to be a well-established doctrine in the construction of statutes of limitation, that cases within the reason but not within the words of the statute are not barred, but may be considered as omitted cases, which the legislature have not deemed proper to limit (*Smith v. Lockwood*, 7 Wend. 241; *Bass v. Bass*, 6 Pick. 362; *Jordan v. Robinson*, 15 Me. 167; *Keith v. Estill*, 9 Port. [Ala.] 669; *Garland v. Scott*, 15 La. Ann. 143; *Bedell v. Janney*, 4 Gilm. [Ill.] 193); and it is claimed that this doctrine is not at war with that so frequently held in the books, that the statute is to be liberally expounded. That liberality of exposition is to be found, not in extending the statutes to cases not clearly within its provisions, but in refusing to withdraw from its operation, such as it manifestly does embrace. *Id.* And see *Jacobs v. United States*, 1 Brock. (C. C.) 523; *Kirkman v. Hamilton*, 6 Pet. (U. S.) 20; *Hazell v. Shelby*, 11 Ill. 9.

The courts of the United States, in the absence of legislation on the subject by congress, recognize the statutes of limitations of the several States, and give them the same construction and effect which are

given by the State tribunals. They are a rule of decision under the thirty-fourth section of the Judiciary Act of 1789. U. S. Rev. Stat., § 721; *McCluny v. Silliman*, 3 Pet. (U. S.) 270; *Hanger v. Abbott*, 6 Wall. 532; *Brown v. Hiatt*, 1 Dill. (C. C.) 372; *Leffingwell v. Warren*, 2 Black (U. S.), 599; *Derby v. Jacques*, 1 Cliff. (C. C.) 425, 439. But had there been no such act of congress, the reason of the statutes, and the obvious justice of giving them due application, as well as consistency of adjudication, and the right of each State to prescribe the conditions and limitations of the liabilities of its citizens, all forbid that a plaintiff should be legally entitled to recover in the Federal court against one whose defense is perfect in the State tribunals. *In re Cornwall*, 9 Blatchf. (C. C.) 114, 128. Therefore, in accordance with a steady course of decision for many years, the Federal judiciary feels it to be an incumbent duty carefully to examine and ascertain if there be a settled construction by the State courts of the statutes of the respective States, where they are exclusively in force; and to abide by, and follow such construction, when found to be settled. *Bank of United States v. Daniel*, 12 Pet. (U. S.) 32, 53; *Harpending v. Dutch Church*, 16 id. 455; *Blanchard v. Sprague*, 1 Cliff. (C. C.) 288. And if the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, the Federal tribunal will follow the latest settled adjudications. *Green v. McNeil*, 6 Pet. (U. S.) 291; *Leffingwell v. Warren*, 2 Black (U. S.), 599.

§ 3. **Its operation and effect.** The difference between the statutes of limitation, as they are known to courts of common law, and the civil law doctrine of prescription consists in this: that the latter confers a right, while the former merely takes away a remedy. *Billings v. Hall*, 7 Cal. 1. The old English statutes of limitation barred the remedy only, not the right (*Higgins v. Scott*, 2 B. & Ad. 413); but the modern statutes cut off the right as well as the remedy. *DeBeauvoir v. Owen*, 5 Exch. 166; *Dundee Harbour v. Dougall*, 1 Macq. H. L. Cas. 317. In this country, statutes of limitation are not generally considered as impairing vested rights, or the obligation of contracts. They are designed to affect the remedy, and not the right or contract. *Wilcox v. Williams*, 5 Nev. 206; *Harding v. Butts*, 18 Ill. 502; *Bentinck v. Franklin*, 38 Tex. 458; *Sichel v. Carrillo*, 42 Cal. 493; *McCagg v. Heacock*, 42 Ill. 153; *Pratt v. Huggins*, 29 Barb. 277; *Jones v. Merchants' Bank*, 4 Robt. (N.Y.) 221; *Wiswell v. Baxter*, 20 Wis. 680; *Knox v. Gallighan*, 21 id. 470; *Johnson v. Albany, etc., R. R. Co.*, 54 N. Y. (9 Sick.) 416; S. C., 13 Am. Rep. 607. They are frequently denominated statutes of repose, because the law, for the purpose of preventing litigation, has wisely determined that there should be some period

fixed, beyond which a party ought not to be allowed to assert stale demands, and that the presumption of payment or of title ought to arise after he had neglected to assert his right for a certain length of time. *Billings v. Hall*, 7 Cal. 1; *Weed v. Bishop*, 7 Conn. 128; *Gospel Society v. Wheeler*, 2 Gall. (C. C.) 105. And see *ante*, p. 225, § 2. But in some of the States the statute of limitations not only bars the remedy for the recovery of personal property, but it acts upon the title and destroys the right of the party against whom it has run. *Winburn v. Cochran*, 9 Tex. 123; *Newcombe v. Leavitt*, 22 Ala. 631. And see *Fears v. Sykes*, 35 Miss. 633.

In *Pritchard v. Howell*, 1 Wis. 131, it is held that the object of the statute of limitations is not to create a presumption of payment after the expiration of six years, or to furnish evidence that demands six years old have been paid or satisfied, but to close the judicial tribunals against their prosecution.

The cases to which statutes of limitation have, by the courts, been construed to be applicable, are referred to in general terms, *ante*, p. 225, § 2. It may be added that in Louisiana the statute cannot be extended from one action to another, nor to analogous cases beyond the strict letter of the law. *Garland v. Scott*, 15 La. Ann. 143. In Connecticut the statute of limitations, though in terms applicable to actions only, applies to all claims which may be the subjects of actions, however presented. *Hart's Appeal*, 32 Conn. 520. In Pennsylvania, it is the *nature* of the cause of action, rather than the *form* of action, which determines the applicability of the statute of limitations. *DeHaven v. Bartholomew*, 57 Penn. St. 126. Statutes of limitation are said to be mere definitions and limitations of the generality of the common-law principle, which is expressed in the maxim, *vigilantibus non dormientibus subveniunt leges*; and it is held that the courts cannot administer such statutes according to their spirit, unless by regarding them as passed in aid of the common law, and therefore as furnishing a general rule for cases that are analogous, according to their subject-matter, to those expressed by the statute. *Forster v. Cumberland Valley R. R. Co.*, 23 Penn. St. 371. And see *McBee v. Loftus*, 1 Strobb. (So. Car.) Eq. 90. And such, perhaps, is the opinion generally entertained by the courts. But see *ante*, p. 225, § 2. After a cause of action has been barred by the statute, it cannot be revived by statute, or by constitutional amendment. *Girdner v. Stephens*, 1 Heisk. 280; 2 Am. Rep. 700; *Yancey v. Yancey*, 5 Heisk. 353; 13 Am. Rep. 5. Though in Florida it was held, that the legislature may repeal a statute limiting the time for commencing civil actions, and thus deprive a party of the right to plead the statute as a defense. *Bradford v. Shine*, 13 Fla. 393; 7 Am.

Rep. 239. While in New Hampshire it is held, that when the statute has run on a debt, the debtor's right to the defense is vested, and any statute which afterward amends or takes it away is unconstitutional. *Rockport v. Walden*, 54 N. H. 167; 20 Am. Rep. 131.

§ 4. **Whether prospective or retrospective.** In this country statutes of limitation are, as a general rule, applied only to a right of action which is to commence *in futuro*, and are not retrospective in their operation. And it is a well-settled principle of law, that the courts are to give such statutes a prospective operation where there is nothing indicating a different intention on the part of the legislature which enacted the statute. See *ante*, pp 223-225, §§ 1, 2; *Ward v. Kilts*, 12 Wend. 137; *Central Bank v. Solomon*, 20 Ga. 408; *Carothers v. Hurley*, 41 Miss. 71; *Stine v. Bennett*, 13 Minn. 153; *Martin v. State*, 24 Tex. 61; *Baldro v. Tolmie*, 1 Oreg. 176; *Pitman v. Bump*, 5 id. 17; *Thompson v. Read*, 41 Iowa, 48. It is, however, an equally well-settled principle, that the legislature may enact retrospective limitation laws where they do not deprive parties of a reasonable time for prosecuting their claims before being barred. *Howell v. Howell*, 15 Wis. 55; *Horbach v. Miller*, 4 Neb. 31; *Sampson v. Sampson*, 63 Me. 328; *Martin v. Martin*, 35 Ala. 560; *Platt v. Batier*, 1 McLean (C. C.), 146; *Root v. Bradley*, 1 Kans. 437; *Pritchard v. Spencer*, 2 Ind. 486; *Ludwig v. Stewart*, 32 Mich. 27. The time and manner of the operation of such laws, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. See *Curtis v. Whitney*, 13 Wall. 68. Cases may, however, occur, where the provisions of the law on these subjects may be so unreasonable as to amount to a denial of a right, and to call for the intervention of the court. *Jackson v. Lamphire*, 3 Pet. (U. S.) 280. Thus, if the legislature of a State should pass an act by which a *past* right of action shall be barred, and without any allowance of time for the institution thereof *in future*, it would be difficult to reconcile such an act with the express constitutional provisions in favor of the rights of private property. *Id.* See, also, *Lewis v. Lewis*, 7 How. (U. S.) 776; *Frey v. Kirk*, 4 Gill & J. (Md.) 509; *Sohn v. Waterson*, 17 Wall. 596; *State v. Clark*, 7 Ind. 468; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, and cases cited above. In New Hampshire it was held that an act of the legislature repealing an act of limitations was, with respect to all actions pending at the time of the repeal, which were previously barred, *retrospective* and contrary to the State constitution. *Woart v. Winnick*, 3 N. H. 473. See, also, *Rockport v. Walden*, 54 N. H. 167; S. C., 20 Am. Rep. 131.

In general, a statute extending the time of limitation will not be so construed as to revive causes of action already barred under pre-existing statutes (*Robb v. Harlan*, 7 Penn. St. 292; *Garfield v. Bemis*, 2 Allen, 445; *Wires v. Farr*, 25 Vt. 41; *Pitman v. Bump*, 5 Oreg. 17; *State v. Bergen, etc.*, 34 N. J. Law, 438); nor take away rights acquired by possession. *Knox v. Cleveland*, 13 Wis. 245; *Forsyth v. Ripley*, 2 Green (Iowa), 181. But, if the cause of action be not already barred, the statute extending the time will apply. *Chandler v. Chandler*, 21 Ark. 95; *Winston v. McCormick*, 1 Smith (Ind.), 8. And see *Cox v. Davis*, 17 Ala. 714; *Royce v. Hurd*, 24 Vt. 620.

In Louisiana, when a statute of limitations is altered during the time it is running against a demand, the time which elapsed before the change is to be computed according to the former law, and the subsequent time according to the new statute. *Fisk v. Bergerot*, 21 La. Ann. 111. And see *Wilcox v. Williams*, 5 Nev. 206.

§ 5. **Rule in courts of equity.** Laches and neglect have always been discountenanced in courts of equity; so that, even where claims are not barred by the statute of limitations, a court of equity will refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice between the parties, when the original transactions may have become obscure by time, and the evidence may be lost. *Harcourt v. White*, 28 Beav. 303; *McDonnell v. White*, 11 H. L. Cas. 570; *Hunt v. Ellison*, 32 Ala. 173; *Hamlin v. Mebane*, 1 Jones' (No. Car.) Eq. 18; *Wilson v. Anthony*, 19 Ark. 16. And that court, besides refusing to interfere where there has been gross laches, or a long or unreasonable acquiescence in the assertion of adverse claims, often adopts, in cases to which the statute of limitations does not strictly apply, a period within which its aid must be sought, similar to that prescribed in analogous cases at law. *Askew v. Hooper*, 28 Ala. 634. See, also, *Palmer v. Malone*, 1 Heisk. (Tenn.) 549; *New Albany v. Burke*, 11 Wall. 96; *Badger v. Badger*, 2 Clif. (C. C.) 137; *Mobley v. Cureton*, 2 S. C. 140; *Havens v. Patterson*, 43 N. Y. (4 Hand) 218. That is, in the consideration of purely equitable rights and titles, the court acts in analogy to the statute, though not bound by it. *Sherwood v. Sutton*, 5 Mas. (C. C.) 146; *Robinson v. Hook*, 4 id. 139, 150; *Sloan v. Graham*, 85 Ill. 27. Thus, when an action upon a legal title to land would be barred by the statute, courts of equity will apply a like limitation to suits founded upon equitable rights to the same property. See *Cheever v. Perley*, 11 Allen, 584; *Crook v. Glenn*, 30 Md. 55. So, in cases of implied or constructive trust, where it is sought for the purpose of maintaining the remedy, to

force upon the defendant the character of trustee, such courts will apply the same limitation as provided for actions at law. *Beaubien v. Beaubien*, 23 How. (U. S.) 190, 207; *Elmendorf v. Taylor*, 10 Wheat. 152, 177; *Sloan v. Graham*, 85 Ill. 27. See, also, *Miller v. McIntyre*, 6 Pet. 61; *Nimmo v. Stewart*, 21 Ala. 682.

But in cases of concurrent jurisdiction, such as matters of account, etc., where the party may proceed either at law or in equity, the statute of limitations applies with equal force in both courts. *Teackle v. Gibson*, 8 Md. 70; *Crocker v. Clements*, 23 Ala. 296; *Platt v. Northam*, 5 Mas. (C. C.) 95; *Bailey v. Carter*, 7 Ired. (No. Car.) Eq. 282. In such cases courts of equity do not act so much in analogy to the statutes as in obedience to them. *Hovenden v. Lord Annesley*, 2 Sch. & Lefr. 607, 629; *Wilhelm v. Caylor*, 32 Md. 151; *Ayer v. Stewart*, 14 Minn. 97; *Dodge v. Essex Ins. Co.*, 12 Gray, 65; *Longworth v. Hunt*, 11 Ohio St. 194, 201; 2 Story's Eq. Jur., § 1520. And see *Carrol v. Green*, 92 U. S. (2 Otto) 509. The rule briefly stated therefore is, that, in cases of concurrent jurisdiction, equity follows the law as to the statute of limitations; but in cases of purely equitable rights and titles equity is not bound by the statute, and only acts in analogy to it. *Hall v. Russell*, 3 Sawyer (C. C.), 506. If the circumstances of the particular case render it equitable and judicious to adopt the statute rule, the court, in the exercise of its discretion as a court of equity, will do so (Id.); otherwise, the court will apply the doctrine of neglect and lapse of time according to discretion, regulated by precedents and the peculiar circumstances. *Bond v. Hopkins*, 1 Sch. & Lefr. 413; *Gould v. Gould*, 3 Story (C. C.), 537; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Lawrence v. Trustees of Leake Orphan House*, 2 Denio, 577; *Henry County v. Winnebago, etc., Co.*, 52 Ill. 454; *Rundle v. Allison*, 34 N. Y. (7 Tiff.) 180; *Glascock v. Nelson*, 26 Tex. 150.

We have already seen (*ante*, p. 225, § 2), that the limitations of the several States in regard to actions at law are made applicable to like actions in the national courts. See also U. S. Rev. Stat., § 721. But this does not include special limitations concerning suits in equity in the courts of a State, and such limitations are not binding on the national courts. *Hall v. Russell*, 3 Sawyer (C. C.), 506. See, also, *Mining Co. v. Bullion Mining Co.*, 3 id. 634. Yet, it is certain, that the national courts, as courts of equity, do recognize and allow lapse of time as a defense, in precise analogy to the statutes of limitation, in cases where such analogy is appropriate. *In re Cornwall*, 9 Blatchf. (C. C.) 114, 128. And see *Lorman v. Clarke*, 2 McLean (C. C.), 568, 573.

The Nevada statute of limitations applies to all kinds of actions.

whether legal or equitable, and is as obligatory upon the courts in a suit in equity as in actions at law. *White v. Sheldon*, 4 Nev. 280. So in Missouri. *Rogers v. Brown*, 61 Mo. 187. Like any other statute, it is to be construed according to the manifest intention of the legislature. In ascertaining such intention the language used should be construed, if possible, according to the usual meaning of the words used. *Treadway v. Wilder*, 12 Nev. 108. See *Wilcox v. Williams*, 5 id. 206.

§ 6. **Computation of time.** It is the general rule, that the time limited by acts of limitation is to be computed from the time at which a right of entry accrues, and from the time at which a creditor is authorized first to commence a suit. If the contract is to pay money at a future period, or upon the happening of a certain event, the statute is inoperative, until the specified period has elapsed, or the particular event has occurred; or, if upon condition, not until the condition has been performed. Ang. on Lim. 34. And see *Rhodes v. Smethurst*, 4 M. & W. 42; *Helps v. Winterbotham*, 2 Barn. & Ad. 431; *Walling v. Wheeler*, 39 Tex. 480; *Codman v. Rodgers*, 10 Pick. 112; *Jacobs v. Graham*, 1 Blackf. (Ind.) 392. In general, the rule of courts of equity is, that the cause of action or suit arises when, and as soon as, the party has a right to apply to such a court for relief. 2 Story's Eq. Jur., § 1521 a; *Whalley v. Whalley*, 3 Bligh, 1. See *post*, p. 243, § 13.

The question has undergone no little discussion in the courts, whether in the computation of time, under the statute, the day on which the cause of action accrued is to be included or excluded. The rule, as stated in accordance with the early English cases is, that where the computation of time is made from an act done, the day on which the act is performed is included, because the act is the *terminus a quo* the computation is to be made; and there being in contemplation of law no fraction of a day (unless when the priority of acts done on the same day becomes necessary), the terminus is considered as commencing the first moment of that day. WASHINGTON, J., in *Pearpoint v. Graham*, 4 Wash. (C. C.) 232. This rule has been applied to cases, arising under the statute of limitations, by some of the courts. See *Presbrey v. Williams*, 15 Mass. 193; *Ryman v. Clark*, 4 Blackf. (Ind.) 329. And see *Arnold v. United States*, 9 Cranch (U. S.), 120. But there can be no question that the preponderance of American authority is the other way. *Bemis v. Leonard*, 118 Mass. 502; S. C., 19 Am. Rep. 470; *Lang v. Phillips*, 27 Ala. 311; *Owen v. Slatter*, 26 id. 547; *McGraw v. Walker*, 2 Hilt. (N. Y.) 404; *Smith v. Cassity*, 9 B. Monr. (Ky.) 192; *Weeks v. Hull*, 19 Conn. 377; *Blackman v. Nearing*, 43 id. 56; S. C., 21 Am. Rep. 634; *Judd v. Fulton*, 10 Barb. 118. In Pennsylvania, a debt was due October 6, 1862; suit was brought

October 6, 1868, and it was held that the action was not barred by the statute. *Menges v. Frick*, 73 Penn. St. 137; S. C., 13 Am. Rep. 731. See, also, *Brisben v. Wilson*, 60 Penn. St. 452. So, where a statute provided that every action on a judgment shall be brought within ten years next after the judgment was entered, and not afterward, and judgment was entered March 15, 1859, and an action was commenced on it March 15, 1869, it was held to have been commenced in time. *Warren v. Slade*, 23 Mich. 1; S. C., 9 Am. Rep. 70. So, in Missouri, where goods were delivered to a vessel under special contract, it was held that the lien on the vessel attaches on the day of delivery, and that the day of the delivery of the last parcel should be excluded in estimating the time when the statute of limitations begins to run. *Steamboat Mary Blane v. Beehler*, 12 Mo. 477. It has, however, been held that, in the computation of time, whether the day on which an act is done or an event happened is to be included or excluded, must depend upon the circumstances and the reason of the thing, so that the intention of the parties may be effected. Such a construction should be given as would operate most to the ease of parties entitled to favor, and by which rights would be secured and forfeitures avoided. *O'Connor v. Towns*, 1 Tex. 107. In Tennessee, where an executor or administrator relies upon the statute of limitations of two or three years, as the case may be, in bar of a creditor's demand, the day on which the executor or administrator qualified must be excluded. *Elder v. Bradley*, 2 Sneed (Tenn.), 247. Where lands are purchased under the fraudulent representation that they are unincumbered, when there is a mortgage thereon, an action for the fraud arises immediately upon the purchase, and an action brought more than six years thereafter, though within six years of the eviction under the mortgage, is barred. *Northrup v. Hill*, 57 N. Y. (12 Sick.) 351; 15 Am. Rep. 501.

The months of limitation are, by the common law, to be taken as *lunar* and not as calendar months. *Rives v. Guthrie*, 1 Jones' (No. Car.) L. 84; *Parsons v. Chamberlain*, 4 Wend. 512; *Brewer v. Harris*, 5 Gratt. (Va.) 285. *Instanter* means twenty-four hours. Co. Litt. 185 b.; Ang. on Lim. 44.

§ 7. **Does not run against the State generally.** That no laches can be imputed to the king, and that no time can bar his rights, was the maxim of the common law and was founded on the principle of public policy that, as he was occupied with the cares of government he ought not to suffer from the negligence of his officers and servants. 1 Bl. Com. 247; *United States v. Hoar*, 2 Mas. (C. C.) 312. The principle is applicable to all governments, which must necessarily act

through numerous agents, and is essential to a preservation of the interests and property of the public. And it is upon this principle that, in this country, the statutes of a State prescribing periods within which rights must be prosecuted are held not to embrace the State itself, unless it is expressly designated, or the mischiefs to be remedied are of such a nature that it must necessarily be included. *Id.*; *People v. Gilbert*, 18 Johns. 227; *Commonwealth v. Johnson*, 6 Penn. St. 136; *Troutman v. May*, 33 id. 455; *Levasser v. Washburn*, 11 Gratt. 572; *Crane v. Reeder*, 21 Mich. 24; S. C., 4 Am. Rep. 430; *State v. Joiner*, 23 Miss. 500; *Swearingen v. United States*, 11 Gill & J. (Md.) 373; *Harlock v. Jackson*, 3 Brev. (So. Car.) 254; *Cary v. Whitney*, 48 Me. 516; *Wallace v. Miner*, 6 Ohio, 366; *Gibson v. Chouteau*, 13 Wall. 92. And as the legislation of a State can only apply to persons and things over which the State has jurisdiction, the United States are also necessarily excluded from the operation of such statutes. *Id.*; *Weatherhead v. Bledsoe*, 2 Overt. (Tenn.) 352; *McNamee v. United States*, 11 Ark. 148; *United States v. Williams*, 5 McLean (C. C.), 133. Even if there be a doubt whether the State was intended to be included, in the language of the statute, that doubt should be resolved in favor of the State. *Minturn v. Laru*, 23 How. (U. S.) 435; *State v. Garland*, 7 Ired. (No. Car.) 48; *County of Des Moines v. Harker*, 34 Iowa, 84. And the rule of law that the State is not included within the statute of limitations is held to apply to suits by the State against the sureties of public officers. *Ware v. Greene*, 37 Ala. 494; *McKeehan v. Commonwealth*, 3 Penn. St. 151. But the rule has no application to a case where the State, though a nominal party on the record, has no real interest in the litigation, but its name is used to enforce the rights of a township, which alone will enjoy the benefits of a recovery. *Miller v. State*, 38 Ala. 600; *State v. Pratte*, 8 Mo. 286. Nor does it apply where a party seeks to enforce his private rights by a writ of *mandamus*, issuing in the name of the State. *Moody v. Fleming*, 4 Ga. 115. So, the bank of the United States was held to be within the operation of statutes of limitation, notwithstanding the "United States" was a stockholder. *Bank of United States v. McKenzie*, 2 Brock. (C. C.) 393. It being a settled principle that, where a sovereign becomes a member of a trading company, he divests himself, with reference to the transactions of the company, of the prerogatives of sovereignty, and assumes the character of a private citizen. *Id.* And see *Lane v. Kennedy*, 13 Ohio St. 42. But the statute is no defense in an action brought by the United States on a note, though they acquired it by transfer. *United States v. White*,

2 Hill, 59. Though it is otherwise if it began to run against the note before its transfer to the United States. *Id.*

The statute does not run against the tenant in possession of land (*Smead v. Williams*, 6 Ga. 158), nor against the holder of a certificate of survey, or purchase, while the title is in the State. *Duke v. Thompson*, 16 Ohio, 34. And see *Thomas v. Hatch*, 3 Sumn. (C. C.) 170; *Kennedy v. Townsley*, 16 Ala. 239. In Texas the State may be barred if the occupant of land be permitted to remain in possession for a period of time fixed by the law as imparting dominion over it. *Jones v. Borden*, 5 Tex. 410. See *Wood v. Welder*, 42 id. 396. The privilege of the maxim, *nullum tempus occurrit regi*, does not apply to any of the subdivisions of the State, such as counties (*County of St. Charles v. Powell*, 22 Mo. 525), cities or other municipal corporations (*City of Wheeling v. Campbell*, 12 W. Va. 36), or to any corporations, private or public. *School Directors v. Goerges*, 50 Mo. 194. Nothing less than sovereignty exempts a party from the statute. *Cincinnati v. First Presby. Church*, 8 Ohio, 298; *City of Cincinnati v. Evans*, 5 Ohio St. 594. But see *Kellogg v. Decatur County*, 38 Iowa, 524.

§ 8. **Of the law of place.** Some doctrines are said to be so well established, that it would be a mere waste of time to attempt to defend them. It is, for instance, a principle of public law perfectly beyond the reach of judicial controversy, that personal contracts are to have the same validity, interpretation and obligatory force in every other country, which they have in the country where they are made, or are to be executed. An exception to the rule is, that no nation is bound to enforce or hold valid any contract, which is injurious to its own rights or those of its citizens, or which offends public morals, or violates the public faith. Another rule equally well settled is, that remedies on contracts are to be regulated and pursued according to the law of the place, where the action is instituted, and not by the law of the place, where the contract is made. STORY, Justice, in *LeRoy v. Crowninshield*, 2 Mas. (C. C.) 151, 157. Hence it is, that the statute of limitations of the country or State in which suit is brought, may be pleaded in bar of a recovery on a contract made out of its political jurisdiction, and that the statute of the place where the contract was made cannot be so pleaded. *Id.*; *Hendricks v. Comstock*, 12 Ind. 238; *Fletcher v. Spaulding*, 9 Minn. 64; *Bigelow v. Ames*, 18 id. 527; *Miller v. Brenham*, 68 N. Y. (23 Sick.) 83; *Crocker v. Arey*, 3 R. I. 178; *Urton v. Hunter*, 2 W. Va. 83; *Pegram v. Williams*, 4 Rich. (So. Car.) 219; *Medbury v. Hopkins*, 3 Conn. 472; *Scuddler v. Union Nat. Bank*, 91 U. S. (1 Otto) 406; *Carpentier v. Minturn*, 6 Lans. (N. Y.) 56; S. C.

affirmed, 55 N. Y. (10 Sick.) 676. Thus, a citizen of the State of Maine, suing a citizen of Massachusetts in the courts of New Hampshire, and the court having acquired jurisdiction of the parties by legal service upon the defendant, the statute of limitations is not available as a defense in any other manner than as though the plaintiff were a citizen of the last-mentioned State. *Paine v. Drew*, 44 N. H. 306. And see *Wilcox v. Williams*, 5 Nev. 206; *Harper v. Hampton*, 1 Har. & J. (Md.) 622; *Watson v. Brewster*, 1 Penn. St. 381; *Jones v. Jones*, 18 Ala. 248; *Blackburn v. Morton*, 18 Ark. 384; *Higgins v. Scott*, 2 B. & Ad. 413; *British Linen Co. v. Drummond*, 10 Barn. & C. 903; *Carson v. Hunter*, 46 Mo. 467; S. C., 2 Am. Rep. 529. But where the statute of limitations, where the contract is made, operates to *extinguish the contract or debt itself*, the case no longer falls within the law in respect to the limitation of the remedy; and when such a contract is sued upon in another State, the *lex loci contractus* and not the *lex fori* is to govern. *McMerty v. Morrison*, 62 Mo. 140; *Brown v. Parker*, 28 Wis. 21; *Fears v. Sykes*, 35 Miss. 633; *Halsey v. McLean*, 12 Allen, 439; *Shelby v. Guy*, 11 Wheat. 361; *Huber v. Steiner*, 2 Bing. N. C. 202; *Don v. Lipman*, 5 Cl. & Fin. 1. But it is held that a law of a foreign State, authorizing proceedings calling on creditors to present their demands against a debtor by a specified day, and declaring the effect of such omission to be, not only to take away the remedy, but to extinguish the debt, will be considered, where there is no insolvency and no surrender of property, in the nature of a statute of limitations affecting the *remedy*, and not the *validity* of the contract. *Lincoln v. Battelle*, 6 Wend. 475.

In Ohio, by statute, actions, barred in the States where the contracts are made, cannot be sued in the former State. *Horton v. Horner*, 16 Ohio, 145. So, in Kentucky, *McArthur v. Goddin*, 12 Bush (Ky.), 274. And see *Snoddy v. Cage*, 5 Tex. 106; *Thompson v. Berry*, 26 id. 263. It is held in New Jersey, that the statute of limitations of that State may be pleaded in bar to an action on a promissory note given in England, although the plaintiff and defendant both resided there when the note came to maturity, and notwithstanding the action was commenced within six years after the defendant came into the State. *Wood v. Leslie*, 35 N. J. Law, 472. See, also, *Taberner v. Brentnall*, 3 Harr. (N. J.) 262; *Hale v. Lawrence*, 1 Zab. (N. J.) 714; *Beardsley v. Southmayd*, 3 Green (N. J.), 171.

Where a demand is barred by the existing law of a foreign State, where the contract was made, it is not revived by being transferred to an inhabitant of the State where the action is brought. *Woodbridge v. Austin*, 2 Tyler (Vt.), 364.

The statutes of limitations of the other States are engrafted upon the law of Louisiana as to judgments only when two conditions concur: *First*, where the judgment has been rendered between persons who reside out of the State, and to be paid out of the State; *Second*, where the defendant removes to the State of Louisiana, after he has become entitled to the benefit of the statute of limitations of the place where the judgment was rendered. *Walworth v. Routh*, 14 La. Ann. 205.

§ 9. **Who may interpose the defense.** Generally, the plea of the statute of limitations is a personal privilege of the party; but with respect to property placed by him beyond his control, his grantees, mortgagees or other third parties, standing in his place, are entitled to the plea. *Dawson v. Callaway*, 18 Ga. 573; *Skidmore v. Romaine*, 2 Bradf. (N. Y.) 122; *Grattan v. Wiggins*, 23 Cal. 16. As a general rule, a wife may plead the statute where any other person may. *Reynolds v. Lansford*, 16 Tex. 286. And a plaintiff, as well as a defendant, may set up the statute. *Watkins v. Dorsett*, 1 Bland (Md.), 530. But it has been held that a foreign corporation cannot plead the statute, either in a personal (*Mallory v. Tioga R. R. Co.*, 3 Abb. App. [N. Y.] 139; *State v. Central Pacific R. R. Co.*, 10 Nev. 47); or a real action. *Barstow v. Union, etc., Mining Co.*, 10 id. 386. And the plea of the statute only inures to the benefit of the party pleading it. *Re Young's Estate*, 3 Md. Ch. 461. If the defendant obstructs the plaintiff from bringing his action, by absconding and concealing, he cannot avail himself of the plea of the statute. *Edwards v. Davis*, 4 Bibb (Ky.), 211. Nor can a party insist upon the statute in bar of claims which he has already confessed in his answer to be unpaid. *Ferris v. Burton*, 1 Vt. 439. But it is held that a party cannot be debarred by an equitable estoppel from availing himself in a court of law of the statute. *Bank of Hartford County v. Waterman*, 26 Conn. 324.

Where the statute of limitations is a bar to a trustee it is also a bar to the *cestui que trust*, for whom he holds the title. *Prescott v. Hubbell*, 1 Hill's (So. Car.) Ch. 210; *Herndon v. Pratt*, 6 Jones' (No. Car.) Eq. 327; *Maddox v. Allen*, 1 Metc. (Ky.) 495. If, on the trial of a cause, the defendant insists that stale demands shall be allowed by the jury, he will not be permitted to set up the statute against similar demands of a like nature on the part of the plaintiffs. *Gulick v. Turnpike Co.*, 14 N. J. Law, 545.

It is now the settled law of New York as to joint debtors, that, in respect of the defense of the statutes of limitation, each stands upon his own bottom. *Denny v. Smith*, 18 N. Y. (4 Smith) 567; *Merritt v. Scott*, 3 Hun (N. Y.), 657; S. C., 6 N. Y. S. C. (T. & C.) 160. It does

not, therefore, follow that because one of such debtors cannot interpose the statute as a defense, others may not. *Id.*

A parol promise by debtor not to plead the statute, if the creditor will allow him further time on a claim which is nearly barred by the statute, does not estop the debtor from setting up the statute in bar of an action brought upon such claim. *Shapley v. Abbott*, 42 N. Y. (3 Hand) 443; 1 Am. Rep. 548. But see *post*, p. 290.

§ 10. **Of the commencement of an action.** Statutes of limitation generally enact that the actions therein mentioned shall be commenced and sued within the time limited. What act of the party commences the suit is, therefore, a matter of judicial construction and decision. *Henderson v. Whitaker*, 2 Burr. 961. The commencement of a suit, to defeat the statute, must be the same suit to which the plea is pleaded. *Delaplaine v. Crowninshield*, 3 Mas. (C. C.) 329. And it would appear to be the general rule, in this country, that, in respect to the statute of limitations, an action is to be deemed as commenced when the writ is issued. *Johnson v. Farwell*, 7 Me. 370; *Blain v. Blain*, 45 Vt. 538; *Hail v. Spencer*, 1 R. I. 17; *State Bank v. Brown*, 12 Ark. 94; *Kinney v. Lee*, 10 Tex. 155; *Butts v. Turner*, 5 Bush (Ky.), 435; *Cheetham v. Lewis*, 3 Johns. 42; *Harris v. Dennis*, 1 Serg. & R. 236. And the writ is considered to have issued when it is delivered to the sheriff, or to his deputy, or when it is sent to either of them with a *bona fide* intention to be served upon the defendant. *Burdick v. Green*, 18 Johns. 14; *Davis v. Duffie*, 8 Bosw. (N. Y.) 617; S. C. affirmed, 1 Abb. Ct. App. 486; 4 Abb. (N. S.) 478; *Evans v. Galloway*, 20 Ind. 479; *Lamkin v. Nye*, 43 Miss. 241; *People v. Clark*, 33 Mich. 112. See *Snyder v. Ives*, 42 Iowa, 157. But the *date* of the writ is not conclusive as to the time when it was taken out. *Henderson v. Whitaker*, 2 Burr. 950, 961; *Society for Prop. of Gosp., etc., v. Whitcomb*, 2 N. H. 227; *Robinson v. Burleigh*, 5 id. 225; *Johnson v. Farwell*, 7 Me. 370. See *Jones v. Jincey*, 9 Gratt. (Va.) 708; *Bunker v. Shed*, 8 Metc. 150. And if the writ be retained by the attorney for the want of a revenue stamp, and a revenue stamp is then affixed, the writ is not completed until the stamp is affixed. *Mason v. Cheney*, 47 N. H. 24. But where an attorney made out a writ, signed and sealed it in the usual way, intending it to be served or proceeded on, but allowed it to remain on his table a week, in order to hear from the attorney of the opposite party, who had intimated a willingness to submit to arbitration, it was held that the suit was to be considered as begun when the writ was made out. *Updike v. Ten Broeck*, 32 N. J. Law, 105.

If an action be commenced within six years, and by the death of one of the parties, the action is abated, the statute has been so con-

strued, that a new action may be commenced though the six years have expired. 6 Com. Dig. 344; Ang. on Lim. 330 And see *Baker v. Baker*, 13 B. Monr. (Ky.) 406. But, in such cases, the new action must be commenced within a reasonable time, such time to date from the granting of letters of administration. *Curlewis v. Mornington*, 40 Eng. L. & Eq. 125. A year shall be said to be reasonable time. *Kinsey v. Heyward*, 1 Ld. Raym. 432, 434. And see *Downing v. Lindsay*, 2 Penn. St. 382; *Brown v. Putney*, 1 Wash. (Va.) 302; *Jackson v. Horton*, 3 Caines (N. Y.), 205.

In California, the filing of a complaint in the proper court, without the issuance of a summons thereon, is the commencement of an action within the terms and meaning of the limitation act, and stops the running of the statute. *Pimental v. City of San Francisco*, 21 Cal. 352; *Allen v. Marshall*, 34 id. 165. See *Maddox v. Humphries*, 30 Tex. 494.

The filing of a bill and taking out the subpoena, and making a *bona fide* attempt to serve it, is the commencement of a suit in equity as against the defendant himself, so as to prevent the operation of the statute, if the suit be afterward prosecuted with due diligence. *Hayden v. Bucklin*, 9 Paige, 512. But the time when a defendant is brought in by amendment, not the time of filing the original bill, is the commencement of the suit as to him. *Brown v. Goolsby*, 34 Miss. 437. So it is held in Missouri, that a suit in equity becomes *lis pendens*, so as to prevent the bar of the statute, if the issuing of the summons is delayed by agreement of counsel. *Wright v. Pratt*, 17 Mo. 43. And it has been held that the filing of the bill is the commencement of the action, although the subpoena be not taken out till the limitation has expired. *Morris v. Ellis*, 7 Jur. 413. See, also, *Purcell v. Blannerhassett*, 3 Jo. & Lat. (Ir.) 24; *Dilworth v. Mayfield*, 36 Miss. 40. See 1 Wait's Pr. 415, 434.

§ 11. **When the statute begins to run as to particular persons.** Where one receives money as the agent of another, the cause of action against him accrues from the time of demand and refusal to pay over. See Vol. 1, tit. *Agency*. The general rule therefore is, that the statute runs from the time of such demand, and not from the time the money was received by the agent. *Hyman v. Gray*, 4 Jones' (No. Car.) L. 155; *Baker v. Joseph*, 16 Cal. 173; *Taylor v. Spears*, 8 Ark. 429; *Judah v. Dyott*, 3 Blackf. (Ind.) 324. Thus, if goods be left with a factor, for sale on commission, the owner has no cause of action, for the price or value of the goods, until a demand by him. And until such demand is made, the statute of limitations will not commence running. *Baird v. Walker*, 12 Barb. 298; S. C., 1 Code Rep. (N.

S. 329; *Topham v. Braddick*, 1 Taunt. 572. But, as a general rule, it is the duty of a *collecting* agent, to pay over the moneys he collects as soon as he receives them. And after a reasonable time from the receipt of notice from an agent that he has collected money for his principal, in which to demand it from the agent, the statute will commence running, although no demand is made. *Lyle v. Murray*, 4 Sandf. (N. Y.) 590. See *Campbell v. Boggs*, 48 Penn. St. 524; *Clark v. Moody*, 17 Mass. 145; *Lawrence University v. Smith*, 32 Wis. 587. In an action against an agent for negligence or unskillfulness, the statute begins to run from the time the negligence or unskillful act was committed, and the plaintiff's ignorance thereof cannot affect the bar of the statute. *Sinclair v. Bank*, 2 Strobl. (So. Car.) 344; *Crawford v. Gaulden*, 33 Ga. 173. See *Sodowsky v. McFarland*, 3 Dana (Ky.), 204.

In cases of a general agency, where there is a current account, the statute of limitations does not attach until the expiration of the agency; but in cases of special agency, where the transactions are isolated, the statute attaches to each item of the account. *Estes v. Stokes*, 2 Rich. (So. Car.) 133; *Hopkins v. Hopkins*, 4 Strobl. (So. Car.) Eq. 207.

Where a bank receives money on deposit in the ordinary way from one of its customers, the latter cannot maintain an action for it without a previous demand either by check or otherwise; and the rule is the same, though the action be for a balance struck on the customer's bank book, by one of the clerks in the bank. *Downes v. Phoenix Bank of Charlestown*, 6 Hill, 297; *Howell v. Adams*, 68 N. Y. (23 Sick.) 314. It has, however, been held that money so deposited was money lent, and could not be recovered back after the lapse of six years from the time of deposit. *Pott v. Clegg*, 16 Mees. & W. 321. And see *Berry v. Pierson*, 1 Gill (Md.), 234.

Where money is deposited with any individual, not a banker, trustee or agent, upon an agreement that he shall pay interest thereon, and that the same shall not be withdrawn except by drafts, payable thirty days after sight, no presumption of payment arises, nor will the statute of limitations run against the debt, until it is shown that drafts drawn in pursuance of the agreement have been presented and dishonored. And it rests upon the party claiming the benefit of the statute to show the presentation and dishonor of such drafts. *Sullivan v. Fosdick*, 10 Hun (N. Y.), 173.

In ordinary cases, where an attorney is employed to take the care and management of a suit, he has a right to consider his employment as continuing to the end of the litigation, unless dismissed by his client; and indeed, he would have no right to abandon it without giving his

client seasonable notice. *Langdon v. Castleton*, 30 Vt. 285. It is therefore held that no right of action accrues to the attorney, and the statute of limitations does not begin to run against his claim for services, until his relation as attorney to the suit is ended. *Mygatt v. Wilcox*, 45 N. Y. (6 Hand) 306; S. C., 6 Am. Rep. 90; *Bathgate v. Haskin*, 59 N. Y. (14 Sick.) 533; *Lichty v. Hugus*, 55 Penn. St. 434; *Davis v. Smith*, 48 Vt. 52. See, also, *Fenno v. English*, 22 Ark. 170; *Eliot v. Lawton*, 7 Allen, 274. In *Foster v. Jack*, 4 Watts (Penn.), 334, it was held that the statute does not run against the claim of an attorney at law, for professional services, so long as the debt which he seeks to recover for his client remains unpaid. See *Morrill v. Graham*, 27 Tex. 646.

The statute does not in general begin to run as to an attorney for money collected by him for his client, until a demand and refusal to pay over the money. *Sneed v. Hanly*, Hempst. (C. C.) 659; *Roberts v. Armstrong*, 1 Bush (Ky.), 263. And see *McCoon v. Galbraith*, 29 Penn. St. 293. It has however been held that where an attorney collects money, on account of his client, and does not notify the client thereof, within a reasonable time, he will be liable to an action for the money, without special demand, and, therefore, the statute will begin to run against the client's claim, from the time when the attorney should have apprised him of the funds in his hands. *Denton v. Embury*, 10 Ark. 228. And see *Downey v. Garard*, 24 Penn. St. 52. The statute begins to run against an action for negligence by an attorney, when such negligence comes to the knowledge of the client. *Derrickson v. Cady*, 7 Penn. St. 27. See *Mardis v. Shackelford*, 4 Ala. 493. Where an attorney receives a note for collection, and gives a receipt therefor, if he neglects to collect the note, the cause of action does not arise at the date of the receipt, but from a reasonable time thereafter for commencing proceedings, and seventeen months is more than a reasonable time. *Rhines v. Evans*, 66 Penn. St. 192; 5 Am. Rep. 364.

A right of action does not accrue to a guardian against his ward, for expenses, until the termination of the guardianship, even in case of the removal of the ward to another State. *Taylor v. Gilgore*, 33 Ala. 214. And the statute of limitations runs in favor of a guardian, only from a final settlement. *Alston v. Alston*, 34 id. 15; *Caplinger v. Stokes*, Meigs (Tenn.), 175. If a person unauthorized to act as guardian for another, but assuming to act as such, should receive money belonging to him, the statute would begin to run immediately, unless there should be an existing disability. *Johnson v. Smith*, 27 Mo. 591.

When the statute begins to run against an action to adjust and settle

the accounts of a partnership depends upon circumstances of the case. *Massey v. Tingle*, 29 Mo. 437. See *Tutt v. Cloney*, 62 id. 116; *Taylor v. Adams*, 14 Ark. 62. But it is held that it does not begin to run, even if the partnership has been dissolved, so long as there are debts due to or from the partnership. *Hammond v. Hammond*, 20 Ga. 556. A debt may be barred by the statute as to a partner residing in the State, notwithstanding the debt continues in force against his absent copartners. *Spaulding v. Ludlow*, 36 Vt. 150.

When a sheriff has received money on an execution, the statute begins to run in his favor from the time it was received. No demand is necessary. *Thompson v. Central Bank of Georgia*, 9 Ga. 413. But see *State v. Minor*, 44 Mo. 373; *Fuqua v. Young*, 14 La. Ann. 216; *Keithler v. Foster*, 22 Ohio St. 27. The right of action against an officer for taking insufficient bail accrues upon the return of *non est inventus*, on the execution against the principal; and the statute begins to run from that time. *Mather v. Green*, 17 Mass. 60; *West v. Rice*, 9 Mete. 564. See *Harriman v. Wilkins*, 20 Me. 93; *Betts v. Norris*, 21 id. 314. Under the New York statute, a cause of action accrues against a sheriff, for not returning an execution placed in his hands the moment the time for returning it expires, and no attachment or notice to the sheriff to return the execution is necessary. *Peck v. Hurlburt*, 46 Barb. 559.

The possession of the tenant is the possession of his landlord, and the statute of limitations does not begin to run against the latter until such tenancy is terminated. *Vanduyne v. Hepner*, 45 Ind. 589.

The cause of action of a surety against his principal accrues when the money is paid (*Thompson v. Stevens*, 2 Nott & M. [So. Car.] 493; *Scott v. Nichols*, 27 Miss. 94); or when the property of a surety is sold to pay the debt of his principal (*Wesley Church v. Moore*, 10 Penn. St. 273); and the statute begins to run in favor of the principal from the time of such payment, or such sale. Id. So, a surety's cause of action for contribution against his co-surety, or his representatives, arises when he pays, and not before. And the statute does not begin to run against his claim until he has paid. *Macey v. Carter*, 10 Yerg. (Tenn.) 521; *Lowndes v. Pinckney*, 1 Rich. (So. Car.) Eq. 155; *Sherwood v. Dunbar*, 6 Cal. 53. And the fact that a surety on a note has never been sued on it, and that more than six years have elapsed since its maturity, does not discharge him from liability to a co-surety for contribution. *Preslar v. Stallworth*, 37 Ala. 402. See Vol. 5, tit. *Principal and Surety*.

When the pledgee remains in possession of the pledge, the statute of limitations will not begin to run against the pledgor until tender of

the debt for which the pledge was given, and a refusal by the pledgee to restore the pledge upon demand by the pledgor. *Whelan v. Kinsley*, 26 Ohio St. 131; *Roberts v. Berdell*, 61 Barb. 37; S. C. affirmed, 52 N. Y. (7 Sick.) 644; 15 Abb. (N.S.) 177. See *Wilkinson v. Verity*, L. R., 6 C. P. 206.

§ 12. When the statute begins to run as to subject-matter in general. It is the general rule, that the statute of limitations begins to run only from the time when the right of action accrued. *Odlin v. Greenleaf*, 3 N. H. 270; *Raymond v. Simonson*, 4 Blackf. (Ind.) 77; *Withers v. Richardson*, 5 T. B. Monr. (Ky.) 94; *Hardee v. Dunn*, 13 La. Ann. 161; *Hall v. Vandegrift*, 3 Binn. (Penn.) 374. Where a right of action depends upon a contingency, the statute does not begin to run until the contingency happens. *Jones v. Lightfoot*, 10 Ala. 17. And when a demand is necessary to perfect a claim, the statute runs only from such demand (*Codman v. Rogers*, 10 Pick. 112); but a demand may be presumed from lapse of time, and such dealings between the parties as render it improbable that it should be neglected. *Raymond v. Simonson*, 4 Blackf. (Ind.) 77; *Staniford v. Tuttle*, 4 Vt. 82.

Where a party enters into a valid agreement, in writing, with the debtor, not to sue upon a particular demand which the former holds, until the happening of a certain event, the running of the statute is suspended until the happening of such event. And it is not necessary to the validity of the agreement that the debtor should sign it. *Smith v. Lawrence*, 38 Cal. 24. See *ante*, § 1, p. 223.

Where a right springs not from a contract, but from legislative enactment, the action to enforce a claim under such enactment may be limited by law; and the legislature is the exclusive judge of the reasonableness of the time allowed within which the action may be brought. *DeMoss v. Newton*, 31 Ind. 219.

The statute of 21 James I (see *ante*, § 1, p. 223), provided that all actions upon the case (other than for slander), actions of account, actions for trespass, debt and detainue, shall be brought within six years next after the cause of such actions, and not after. Acts of limitation in this country contain a provision substantially the same, which is subjected to like rules of construction. See *ante*, § 2, p. 225. Such acts, being in aid of the common law, are held to furnish a general rule for cases that are analogous in their subject-matter, but for which a remedy unknown to the common law has been provided by statute. Thus, in Pennsylvania, the statute was applied to a case where compensation was sought for damages for land taken for a railroad. *Förster v. Cumberland R. R. Co.*, 23 Penn. St. 371. But see *contra*:

Delaware, etc., R. R. Co. v. Burson, 61 id. 369. So, in Connecticut, the statute, though in terms applicable to actions only, is applied to all claims that may be the subject of actions, however presented. *Hart's Appeal*, 32 Conn. 521. And in Tennessee, where a cause of action is barred by the statute if enforced by regular action, the same is equally barred if prosecuted by summary proceedings. *Butler v. Winters*, 2 Swan, 91; *Prewett v. Hilliard*, 11 Humph. 423.

As to the old action of *account*, see Vol. 1, tit. *Accounting*. The period of limitation to an action of *account* is the same in equity, in a suit upon matters of account, as at law. See id.; *Prince v. Heylin*, 1 Atk. 493. The action of *assumpsit*, though not named in the above section of the statute of James I, was construed by the early cases to be within the statute, being fairly included in trespass on the case. *Harris v. Saunders*, 4 Barn. & C. 411; *Beatty v. Burnes*, 8 Cranch, 98; *Chively v. Bond*, 4 Mod. 105; *Haven v. Foster*, 9 Pick. 112; *Williams v. Williams*, 5 Ohio, 444. And it will be found generally true that the American acts of limitation include the action of *assumpsit, eo nomine*. See Ang. on Lim. App. As to the action of *debt*, see Vol. 2, p. 481.

An action of debt founded on a contract arising from an implication of law is within the statute of limitations. *Wickersham v. Lee, No. 2*, 83 Penn. St. 422.

§ 13. **The effect of fraud upon the statute.** See Vol. 3, p. 472 *et seq.* It is the settled doctrine of courts of equity, that the statute of limitations only begins to run, in cases of fraud, from the time of the discovery of the fraud and not before. *Shields v. Anderson*, 3 Leigh, 729; *Currey v. Allen*, 34 Cal. 254; *Longworth v. Hunt*, 11 Ohio St. 194; *Evans v. Bacon*, 99 Mass. 213; *Meader v. Norton*, 11 Wall. 443; *Bailey v. Glover*, 21 id. 346; *Bricker v. Lightner*, 40 Penn. St. 199; *Parham v. McCravy*, 6 Rich. (So. Car.) Eq. 140. In this, courts of equity differ from courts of law, which are absolutely bound by the words of the statute (*Brooksbank v. Smith*, 2 Young & Coll. 58); and the limitation of actions for fraud, at law, begins to run from the commission of the fraud. *Pyle v. Beckwith*, 1 J. J. Marsh. (Ky.) 445; *Troupe v. Smith*, 20 Johns. 33; *Foot v. Farrington*, 41 N. Y. (2 Hand) 164; *Rice v. White*, 4 Leigh (Va.), 474; *York v. Bright*, 4 Humph. (Tenn.) 312; *Thrower v. Cureton*, 4 Strobh. (So. Car.) Eq. 155. And it is held that where the fraud is not actual, but merely constructive, the statute applies (*Wilmerding v. Russ*, 33 Conn. 68); but it is otherwise in California. *Boyd v. Blankman*, 29 Cal. 19. And it is said that a court of equity will not open accounts and sustain claims on account of fraud which are barred by the statute, with-

out exercising great caution. *Couch v. Couch*, 9 B. Monr. (Ky.) 160; *Wagner v. Baird*, 7 How. (U. S.) 234.

Notwithstanding the authorities above cited, the doctrine has been maintained that where there is fraud, the statute does not operate in courts of law until the party affected is conscious of it. See *Mass. Turnp. Co. v. Field*, 3 Mass. 201; *Cole v. McGlathry*, 9 Me. 131; *Raymond v. Simonson*, 4 Blackf. (Ind.) 85; *Mitchell v. Thompson*, 1 McLean (C. C.), 96; *Sherwood v. Sutton*, 5 Mas. (C. C.) 143; *Livermore v. Johnson*, 27 Miss. 284. In Pennsylvania, fraud not discovered until after six years may be successfully replied to a plea of the statute. *McDowell v. Young*, 12 Serg. & R. 128; *Harrisburg Bank v. Forster*, 8 Watts, 12. In Mississippi, the statute commences running from the time of the commission of the fraud, and not from the time when the injury occasioned by it to the plaintiff is established. But where a relation of trust and confidence exists between the parties so as to render it the duty of the defendant to disclose the true state of the case to the plaintiff, the statute commences to run only from the time of the discovery of the fraud or deceit. *Littlejohn v. Gordon*, 32 Miss. 235; *Buckner v. Calcote*, 28 id. 432. The Indiana statute providing that actions for relief against frauds must be commenced within six years after the cause of action has accrued, applies as well to suits in equity as at law, and under the statute, time begins to run before discovery of the cause of action, unless the defendant shall conceal his liability. *Pilcher v. Flinn*, 30 Ind. 202. So, the rule is said to have been very well settled under the English statute of limitations, that where the party against whom a cause of action existed in favor of another, by fraud or actual fraudulent concealment, prevented such other from obtaining knowledge thereof, the statute would only commence to run from the time the right of action was discovered, or might, by the use of diligence, have been discovered. See *Chetham v. Hoare*, L. R., 9 Eq. 571; *Vane v. Vane*, L. R., 8 Ch. App. 383; S. C., 5 Eng. R. 607; *Clarke v. Hougham*, 2 Barn. & C. 149; *Cowper v. Godmond*, 9 Bing. 748; *Granger v. George*, 7 Dowl. & Ry. 729; 5 B. & C. 149; *Wear v. Skinner*, 46 Md. 257; S. C., 24 Am. Rep. 517; *Vanbibber v. Beirne*, 6 W. Va. 168. Such is the rule in Iowa (*District Township of Boomer v. French*, 40 Iowa, 601); and where there is no fraudulent concealment of the fact that a right of action exists, but a concealment merely of the existence of property from which a judgment might be satisfied, the operation of the statute of limitations is not suspended. *Humphreys v. Mattoon*, 43 id. 556. See, also, *State v. Giles*, 52 Ind. 356; *Wynne v. Cornelison*, 52 id. 312.

The time limited for suing for a fraudulent conversion runs from

the discovery of the fraud, in Minnesota. *Commissioners of Mower v. Smith*, 22 Minn. 97. See, also, *Meyer v. Quartermous*, 28 Ark. 45.

In Maine an action lies for money had and received against one who fraudulently procures the surrender of his own past due note, without payment; and the statute of limitations will commence to run only from the time when the fraud was discovered, or might, by due diligence, have been discovered. *Penobscot R. R. Co. v. Mayo*, 67 Me. 470; S. C., 24 Am. Rep. 45.

Although the statute of limitations of Georgia excepts suits for fraud, yet, the fact that for a period beginning after the statute commenced running, and terminating before the bar attached, the note was in the hands of the principal maker as an attorney at law, under his professional engagement to sue it, to judgment, against himself and his sureties, which engagement he violated, is no reply to a plea of the statute by such principal maker. *Callaway v. West*, 56 Ga. 684.

But where a claim was lost through the misconduct or fraud of an attorney, with whom a collection agency had intrusted it for collection, and the replies of the agency to inquiries made were calculated to throw the claimants off their guard, it was held, in Pennsylvania, that the statute of limitations only began to run against the claimants from the time of their discovery of the fraud. *Morgan v. Tener*, 83 Penn. St. 305; *Wickersham v. Lee*, 83 id. 416.

The rule that the statute of limitations does not run in favor of a party concealing the cause of action was applied, in Massachusetts, in an action by a bank against its president, for money had and received, and falsely represented by him to have been paid over to an agent to whom the bank was indebted. *Atlantic Nat. Bank v. Harris*, 118 Mass. 147.

A Maryland statute provided that "where a party has a cause of action, of which he has been kept in ignorance by the fraud of the adverse party," the statute of limitations should not begin to run until the fraud was discovered. And it was held that where the cause of action was the fraud of the defendant, the mere concealment by him of such fraud was sufficient to prevent the running of the statute of limitations. *Wear v. Skinner*, 46 Md. 257; S. C., 24 Am. Rep. 517.

§ 14. **Bills and notes.** A promissory note, payable on demand, whether with or without interest, is due forthwith, so that the statute commences running from the date of the note (*Wheeler v. Warner*, 47 N. Y. [2 Sick.] 519; S. C., 7 Am. Rep. 478), or from its delivery if without date. *Palmer v. Palmer*, 36 Mich. 487; S. C., 24 Am. Rep. 605; *Smith v. Bycewood*, 1 Rice (So. Car.), 245. And no special

demand is necessary. *Id.*; *Norton v. Ellam*, 2 Mees. & W. 461; *Caldwell v. Rodman*, 5 Jones' (No. Car.) L. 139; *Ruff v. Bull*, 7 Harr. & J. (Md.) 14; *Wilks v. Robinson*, 3 Rich. (So. Car.) 182; *Hill v. Henry*, 17 Ohio, 9; *Larason v. Lambert*, 12 N. J. Law, 247; *Fell's Point Savings Institution v. Weedon*, 18 Md. 320; *Bartlett v. Rogers*, 3 Sawyer, 62. But see *Leo v. Cassin*, 2 Cranch (C. C.), 112. A non-negotiable note, payable "thirty days after demand," was held to be within the same principle. *Palmer v. Palmer*, 36 Mich. 487; S. C., 24 Am. Rep. 605. On the other hand it has been held that, in the latter case, the statute commences running only from the time of the demand. *Thorpe v. Combe*, 8 Dowl. & Ry. 374; *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267. And see *Thrall v. Mead*, 40 Vt. 540; *Little v. Blunt*, 9 Pick. 488; *Wolfe v. Whiteman*, 4 Harr. (Del.) 246; *Taylor v. Witman*, 3 Grant's (Penn.) Cas. 138; *Richman v. Richman*, 5 Halst. (N. J.) 114; Ang. on Lim. 91. But the demand must be made within a reasonable time from the time of the date. If no cause for delay can be shown the demand is barred, unless made within the period of the statute of limitations, and the right of action is extinguished by the delay. *Morrison v. Mullin*, 34 Penn. St. 12; *Palmer v. Palmer*, 36 Mich. 487; S. C., 24 Am. Rep. 605; *Thrall v. Mead*, 40 Vt. 540. There is said to be the same reason for hastening the demand that there is for hastening the commencement of the action. WILDE, J., in *Codman v. Rogers*, 10 Pick. 120. See, also, *Keithler v. Foster*, 22 Ohio St. 27. On a note or bill payable on or after sight, or after notice, it is held that the statute does not begin to run until presentment or notice. *Holmes v. Kerrison*, 2 Taunt. 323; *Wolfe v. Whiteman*, 4 Harr. (Del.) 246. But the presentment or notice must be made in a reasonable time, having in view the circumstances of each particular case. *Wallace v. Agry*, 4 Mas. (C. C.) 336. And see the cases above cited. When a bill is refused acceptance and notice thereof is duly given, the statute runs from the time of refusal and notice. *Whitehead v. Walker*, 9 Mees. & W. 506; Ang. on Lim., § 97. In computing the time at which the statute begins to run, on promissory notes, the day on which the note becomes due is excluded, in all cases, when days of grace are allowed. *Bell v. Sackett*, 38 Cal. 407; *Pickard v. Valentine*, 13 Me. 412; *Blackman v. Nearing*, 43 Conn. 56; S. C., 21 Am. Rep. 634. The statute of limitations does not begin to run against a promissory note until three days after the date, when, by its terms, it is due. *McCoy v. Farmer*, 65 Mo. 244. And see *Salt Springs Nat. Bank v. Burton*, 58 N. Y. (13 Sick.) 430; S. C., 17 Am. Rep. 265; *ante*, p. 231, § 6. And an action upon a promissory note, payable one day after date, without grace, begun on the day following

the execution of the note, is held to be premature. *Davis v. Eppinger*, 18 Cal. 378; *Hathaway v. Patterson*, 45 id. 294. An action is well brought on the 24th of December, 1874, on a note dated December 24, 1867, payable in one year from its date, and not entitled to grace, if it does not appear that there was a demand and refusal of payment on the day the note fell due. *Beeman v. Cook*, 48 Vt. 201; S. C., 21 Am. Rep. 123. The statute does not begin to run against a bill of exchange, made payable at a particular place, until after a demand at such place and a dishonor there. *Picquet v. Curtis*, 1 Sumn. (C. C.) 478. On a promissory note, given as a contingent guaranty and payable according to assessments to be made after other assets are exhausted, the statute does not begin to run until that contingency occurs. *Hope Mut. Ins. Co. v. Perkins*, 2 Abb. App. (N. Y.) 383; S. C., 38 N. Y. (11 Tiff.) 404. Upon a promise signed by the defendant, "to pay at any time within two years," it is held to be for the makers to determine the time, and consequently they are not in default, and the statute does not begin to run until after the two years. *Creighton v. Rosseau*, 1 Iowa, 133. And see *Jones v. Eisler*, 3 Kans. 134. But a promise in writing, to pay a note "at any time within six years from this date," is held to be a promise to pay on demand, and the statute begins to run, against a claim founded on such written promise, from the date. *Young v. Weston*, 39 Me. 492.

When a note is made payable in several annual payments, the cause of action for the first payment accrues as soon as it becomes payable, and the statute begins to run against it from that time, and not from the time when the latest sum should be paid. *Burnham v. Brown*, 23 Me. 400. And see *Baltimore, etc., Turnp. Co. v. Barnes*, 6 Harr. & J. (Md.) 57. Nearly six years after a note was due, the maker gave in place of it a new note, antedated five years, which was accepted; and it was held by the New Jersey court, that the statute was a bar to an action on the note more than six years after the date of it, although only a year after its delivery, it not having been antedated by mistake, or for any unlawful purpose, but to carry into effect the object of the parties. *Paul v. Smith*, 32 N. J. Law, 13. The holder of a bank check, which has been marked as "good" by the bank on which it is drawn, is bound to present it and demand payment within six years from the time of the making of the check, or the claim will be barred by the statute in Pennsylvania. *Girard Bank v. Bank of Penn Township*, 4 Phil. (Penn.) 104.

The statute does not commence running upon a bank bill immediately upon its being issued, but when a demand of payment is made. *Thurston v. Wolfborough Bank*, 18 N. H. 391. See *Kimbrow v. Bank*

of *Fulton*, 49 Ga. 419; *Samples v. Bank*, 1 Woods, 523. Nor is a bank liable upon a certificate of deposit until after demand of payment, and, therefore, the statute does not begin to run against it until demand is made. *Howell v. Adams*, 68 N. Y. (23 Sick.) 314; *National Bank of Fort Edward v. Washington Co. Nat. Bank*, 5 Hun, 605; *Girard Bank v. Bank of Penn Township*, 39 Penn. St. 92. And see *Pardee v. Fish*, 67 Barb. 407. But it has been thought that the statute runs from the date of a certificate of deposit, payable on demand. *Tripp v. Curtinius* 36 Mich. 494; S. C., 24 Am. Rep. 610; *Brummagin v. Talant*, 29 Cal. 503. And see *Poorman v. Mills*, 35 id. 118.

The statute begins to run against the liability of an indorser of a bill of exchange, from the time of the dishonor by the acceptor, and not from the time of the payment by a subsequent indorser. *Hunt v. Taylor*, 108 Mass. 508. See Vol. 5, pp. 185-247, tit. *Principal and Surety*.

Where the maker of a note neglected to pay it at maturity, and the surety being then unable to pay it, obtained time from the holder upon giving collateral security, and finally paid it more than six years after maturity, it was held, in an action by the surety against the maker, that the statute did not begin to run against the plaintiff until he paid the note. *Norton v. Hall*, 41 Vt. 471. And see *Hayes v. Morse*, 8 id. 319; *Pope v. Bowman*, 27 Miss. 194; *Barnsback v. Reiner*, 8 Minn. 59; *Barker v. Cassidy*, 16 Barb. 177.

It is held that the statute does not commence running in favor of the maker of a guaranty, indorsed upon a promissory note, until a cause of action has accrued upon the contract of guaranty. *Cooper v. Dedrick*, 22 Barb. 516. See *Mobile, etc., R. R. Co. v. Jones*, 57 Ga. 198.

Where a mortgage was given by the maker of a note to his surety, conditioned that if the maker should pay the amount for which the note was given, and save the surety harmless from all demands upon it, the conveyance should be void, it was held that the statute did not begin to run against the mortgagee until actual payment of the note by him. *McLean v. Ragsdale*, 31 Miss. 701.

The cause of action on a premium note given to an insurance company, payable "in such portions and at such time or times as the directors" may require, does not accrue until an assessment has been made upon it, and notice thereof given to the maker; and from that time the statute begins to run. *Howland v. Cuykendall*, 40 Barb. 320; *Re Slater Mut. Fire Ins. Co.*, 10 R. I. 42; *Bigelow v. Libby*, 117 Mass. 359.

In a few of the States, the statute of limitations has no application to promissory notes which are *witnessed*. This is so in Maine (*Stanley v. Kempton*, 30 Me. 118; *Trustees, etc., v. Rowell*, 49 id. 330); in Massa-

chusetts (*Faulkner v. Jones*, 16 Mass. 290; *Rockwood v. Brown*, 1 Gray, 261), and in Vermont. *Carpenter v. McClure*, 38 Vt. 375; S. C., 40 id. 108. It makes no difference that the note is not negotiable (*Sibley v. Phelps*, 6 Cush. 172), nor that the maker of the note is an infant. *Earle v. Reed*, 10 Mete. 387. But it is held that a note payable in specific articles is not within the exception (*Gillman v. Wells*, 7 Me. 25; *Dennett v. Goodwin*, 32 id. 44); otherwise, in Vermont. *Bragg v. Fletcher*, 20 Vt. 351. If the original promisee of a witnessed note, after six years, transfers it, the note is put upon a footing with notes not witnessed; that is, the statute will begin to run against the indorsee from the time of the transfer. *Frye v. Barker*, 4 Pick. 384. But see *Stanley v. Kempton*, 30 Me. 118.

If a person write his name upon a note as a witness to its execution, although there are no words of attestation, or otherwise, expressive of the object and purpose of the signature, it will be a sufficient attestation. *Faulkner v. Jones*, 16 Mass. 290. But one who sees a note signed has no right to subscribe his name as a witness at another time, and without a knowledge and consent of the promisor; and a note thus subscribed will not come within the exception in regard to witnessed notes. *Smith v. Dunham*, 8 Pick. 246; *Brown v. Cousens*, 51 Me. 301. And see *Walker v. Warfield*, 6 Mete. 466. The following memorandum, written upon the back of a promissory note, and signed in the presence of an attesting witness, "I hereby renew the within note," is a *witnessed* promissory note, within the exception of the statute. *Daggett v. Daggett*, 124 Mass. 149. So, a memorandum written on a note by the maker in these words, "For value received, I hereby acknowledge this note to be due, and promise to pay the same on demand," and signed in the presence of an attesting witness, is a promissory note within the exception. *Commonwealth Ins. Co. v. Whitney*, 1 Mete. 21. But a memorandum on the back of a promissory note, in these words, "I acknowledge the within note to be just and due," signed by the maker and attested by a witness, is not a promissory note signed in the presence of an attesting witness, within the exception, there being no express promissory words. *Gray v. Bowden*, 23 Pick. 282.

An unattested indorsement is neither within the language nor the spirit of the Maine statute, which excepts attested promissory notes from the general limitation of six years as applicable to personal contracts. *Wallace v. Stevens*, 64 Me. 225. And a defendant who signs a note, already signed by others to whose signatures there is an attesting witness, may plead the statute. As to him the note is not a witnessed one. *Trustees, etc., v. Rowell*, 49 id. 330. So, a memorandum

in writing, whereby the maker agrees to pay a note "at any time within six years from this date," is not a promissory note, and it is subject to the bar of the statute of limitations after six years, although attested by a witness. *Young v. Weston*, 39 id. 492.

Under the Massachusetts statute, if a part payment has been made on an attested promissory note, the original payee may maintain an action upon it at any time within twenty years after the date of such payment (*Gilbert v. Collins*, 124 Mass. 174); so, under the statute of Maine. *Estes v. Blake*, 30 Me. 164; *Lincoln Academy v. Newhall*, 38 id. 179. But the limitation of witnessed notes in Vermont is fourteen years (*Bragg v. Fletcher*, 20 Vt. 351); and a single witness to a joint note must have attested all the signatures, to fortify the note against the statute of limitations. *Lapham v. Briggs*, 27 id. 26.

§ 15. **Contracts in general.** The statute of limitations begins to run against contracts generally, from the time a cause of action accrues on the contract. *Atherton v. Williams*, 19 Ind. 105; *Dobyns v. Schoolfield*, 10 B. Monr. (Ky.) 311; *Bennett v. Herring*, 1 Fla. 387. Upon a contract limited as to the time of its existence, the statute runs from the limit fixed in the contract. *Walling v. Wheeler*, 39 Tex. 480. See *ante*, p. 223, § 1. Where a contract to do a thing contemplates a reasonable time to be allowed therefor, the statute does not begin to run till after its expiration, and the question of reasonable time is for the jury. *Evans v. Hardeman*, 15 Tex. 480. On a claim for work and labor, the statute begins to run from the time when the work was finished, and not from the time when the contract was made. *Zeigler v. Hunt*, 1 McCord (S. C.), 577. And see *Jones v. Lewis*, 11 Tex. 359. And the statute begins to run, so as to bar an action on a contract to complete a certain work, from the time when the work was to have been completed, and not from the time when the plaintiff had received actual damage from the imperfect execution of the work. *Rankin v. Woodworth*, 3 Penr. & Watts (Penn.), 48; *Argall v. Bryant*, 1 Sandf. (N. Y.) 98. But the day from which the count is to be made is excluded from the computation. *Menges v. Frick*, 73 Penn. St. 137; S. C., 13 Am. Rep. 733. See *ante*, p. 231, § 6.

Where the parties, through a period of many years, treat their contract to marry as a continuing one, by recognizing its existence and promises of its fulfillment, the statute of limitations will not begin to run until one party has broken the engagement or until notice is given of a termination of the agreement. *Blackburn v. Mann*, 85 Ill. 222.

Under a contract for work and labor to be paid for after the death of the employer, the statute of limitations will not commence to run until after the occurrence of that event. *Riddle v. Backus*, 38 Iowa, 81;

Titman v. Titman, 64 Penn. St. 480; *Minno v. Walker*, 14 La. Ann. 581.

The time allowed for bringing a suit in the court of claims upon a government contract, begins to run when the government gave a notice to the contractor that they terminate the contract. *Shimming v. United States*, 10 Ct. of Cl. 465. And the limitation is not suspended while the contractor has a claim pending in one of the departments. *Id.*

The law implies a warranty of title in the vendor of a chattel, and an action for breach of such warranty accrues at the time of the sale of the chattel, and the statute runs from that time. *Scott v. Scott*, 2 A. K. Marsh. (Ky.) 217; *Chancellor v. Wiggins*, 4 B. Monr. (Ky.) 201; *Perkins v. Whelan*, 116 Mass. 542. But see *Gross v. Kierski*, 41 Cal. 111. So, in an action for the breach of a warranty of soundness, the statute does not begin to run from the time when an injury befalls the purchaser, in consequence of the unsoundness, but from the date of the contract. *Baucum v. Streater*, 5 Jones' (No. Car.) L. 70. And a cause of action for the price of a thing sold accrues on the day of sale, if the particular thing sold is then set apart for the buyer, though not delivered till afterward, and the statute begins to run from the day of sale. *Austin v. Dawson*, 75 No. Car. 523.

While a promise is suspended by a condition, the statute does not run from the time of making it, since no right of action accrues till the condition is performed, or the event stipulated for happens. *Stewart v. Marston*, 12 La. Ann. 356; *Nimmo v. Walker*, 14 id. 581; Ang. on Lim., § 113. If, in a contract to pay money on a condition, no time of payment or performance of the condition be fixed, the statute begins to run after the expiration of a *reasonable* time for payment. *Doe v. Thompson*, 22 N. H. 217. And see *Thomas v. Croft*, 2 Rich. (So. Car.) 113. Where a promise was made to pay a debt on the event of a contingency, the consummation of which depended wholly on the promisor, it was held that the statute began to run from the date of the promise. *McDowell v. Goodwyn*, 2 Mill's (So. Car.) Const. 441. And, as against a promise to pay, upon a contingency which does not suspend the right of action, the statute runs from the making of the promise, and not from the happening of the contingency. *Motley v. Montgomery*, 2 Bailey (So. Car.), 544.

In the case of a promise to repay money, paid at the request of the promisor to a third person, the cause of action arises when the money is paid, and the statute then begins to run, and not when the promise is made. *Perkins v. Littlefield*, 5 Allen, 370. When a party consents to pay the expenses of a suit, in consideration of the promise of an-

other to share such expenses, "when ascertained," the statute does not begin to run until such expenses have actually been paid by the promisee. *Dorwin v. Smith*, 35 Vt. 69. It has been held that, where money is deposited with one person for the use of another, the cause of action accrues to the latter from the time of the deposit, and the statute commences running from that time. *Buckner v. Patterson*, Litt. Sel. Cas. (Ky.) 234. But see *Hutchins v. Gilman*, 9 N. H. 359.

The statute of limitations does not begin to run upon a demand until the principal, or at least some separate and distinct portion of the principal, becomes due and payable, and then, only upon such distinct and separate portion. The interest, accruing from year to year, is not thus separated from the principal demand, and, consequently, the statute does not run upon it until the principal is barred by the statute. *Grafton Bank v. Doe*, 19 Vt. 463.

Where a party has a claim against the State, arising out of contract, the statute begins to run against it from the time when the indebtedness arises, and not merely from the time when the claim is presented to the legislature for allowance. *Baxter v. State*, 17 Wis. 588.

As a general rule, the statute begins to run in the case of a promise of indemnity, from the time when the promisee actually pays the money or damages, and not from the time when he is liable to pay it. *Colvin v. Buckle*, 8 Mees. & W. 680; *Collinge v. Heywood*, 1 P. & Dav. 502; *Carter v. Adamson*, 21 Ark. 287. But if the promise be to indemnify against liability, the right of action accrues as soon as the party becomes liable to pay, and is not postponed until actual payment. *Webb v. Pond*, 19 Wend. 423; *Murrell v. Johnson*, 1 Hen. & Mumf. (Va.) 450; *Macey v. Childress*, 2 Tenn. Ch. 438. The rule, in brief, to be extracted from the cases is, that where indemnity only is expressed, damages must be sustained before a recovery can be had; but a positive agreement to do an act which is to prevent damage to the plaintiff will sustain an action where the defendant neglects or refuses to do such act. *Rector, etc., of Trinity Church v. Higgins*, 48 N. Y. (3 Sick.) 532. The cause of action upon an interest coupon, originally annexed to a bond of a public corporation but which has been detached from the bond and transferred and is held as an independent contract, accrues at the maturity of the coupon, and the statute of limitations commences to run from that time. *Clark v. Iowa City*, 20 Wall. 583.

Where a loan of money is made, "to be paid when called for," or "on demand," the statute begins to run in favor of the borrower from the date of the loan. *Ware v. Hewey*, 57 Me. 391; *Cook v. Cook*, 19 Tex. 434; *Hall v. Letts*, 21 Iowa, 596; *Darnall v. Magruder*, 1 Harr. & G. (Md.) 439. And it is held that, in general, the stat-

ute commences to run against an action upon a subscription to stock of a corporation, as to each installment called in, from the time when the directors make the call. *Western R. R. Co. v. Avery*, 64 No. Car. 491. See *Pittsburg, etc., R. R. Co. v. Byers*, 32 Penn. St. 22, which holds that although the statute does not begin to run against a subscription to the stock of a railway company, until after calls are made for installments, yet, where no call is made for more than six years from the date of subscription, the law will presume an abandonment of the enterprise, and, from analogy to the statute, bar the recovery, unless the delay be satisfactorily accounted for. *McCully v. Pittsburg, etc., R. R. Co.*, id. 25. If the obligation of the stockholder be intended to secure the payment of any loans effected by the company, it is held that the statute begins to run in favor of the stockholder at the maturity of the bonds issued by the company for its first loan. *Haynes v. Wall*, 13 La. Ann. 258; *Clinton, etc., R. R. Co. v. Eason*, 14 id. 816.

If the law makes it the duty of a public officer to pay over funds in his custody at stated times, no demand is necessary; and the statute commences to run in his favor from the set time for payment, irrespective of whether a demand was made or not. *Moore v. State*, 55 Ind. 360.

In a suit to recover back money paid upon a voidable contract, the statute begins to run from the time the contract is terminated by one party or the other, and not before. *Collins v. Thayer*, 74 Ill. 138.

An action for negligence in setting a broken arm arises on contract, and not in tort. *Staley v. Jameson*, 46 Ind. 159; 15 Am. Rep. 285. See § 20, p. 262, *post*.

§ 16. **Judgments.** A judgment is not an agreement, contract, or promise in writing, nor is it in a legal sense a specialty. It is therefore held, that the statute of limitations of 21 James I, and similar statutes of limitation in this country, do not bar an action on a judgment. See *Dudley v. Lindsey*, 9 B. Monr. (Ky.) 486; *Todd v. Crumb*, 5 McLean (C. C.), 172; *Mitchell v. Mitchell*, 8 Humph. (Tenn.) 359; *Reddington v. Julian*, 2 Cart. (Ind.) 224; *Stewart v. Peterson*, 63 Penn. St. 230. And it was decided in an early New York case, that an action of debt upon a judgment, in a justices' court, was not barred by the statute of limitations (*Pease v. Howard*, 14 Johns. 479); and the same was held by the supreme court of New Hampshire. *Mahurin v. Bickford*, 8 N. H. 54. And in Pennsylvania, a decree of the orphans' court, fixing the amount in the hands of an executor, is held to be in the nature of a judgment, and not within the statute. *Burd v. McGregor*, 2 Grant's (Penn.) Cas. 353. But it was held in South Carolina,

that a judgment of a court of justice, for the trial of causes small and mean, is within the operation of the statute. *Griffin v. Heaton*, 2 Bail. (So. Car.) 58. So, in Massachusetts, judgments of a justice of the peace are barred by statute. But the police court of Lowell was held to be a court of record, and its judgments not within the statute. *Bannegan v. Murphy*, 13 Metc. 251. In Maine, a judgment of the court of county commissioners is within the statute. *Woodman v. Somerset*, 37 Me. 29. So, in Mississippi, a decree rendered in the probate court in favor of a distributee, against the administrator, is within the statute. *Dilworth v. Carter*, 32 Miss. 206. And since the adoption of the Revised Statutes in New York, justices' judgments have been subject to the operation of the statute of limitations. *Carshore v. Huyck*, 6 Barb. 583. Where a statute requires that every action on a judgment shall be brought within ten years next after the judgment is entered, and not afterward, an action commenced March 15th, 1869, on a judgment entered March 15th, 1859, is well brought, and in due time. *Warren v. Slude*, 23 Mich. 1; 9 Am. Rep. 70.

The rule that the statute does not bar an action on a judgment has no application to a *foreign* judgment. A foreign judgment being *prima facie* evidence of the debt only, is considered of no higher nature than a simple contract, and a necessary consequence of this is, that the statute of limitations may be pleaded to it. *Pease v. Howard*, 14 Johns. 470; *Harris v. Saunders*, 4 Barn. & C. 411; *Stockwell v. Coleman*, 10 Ohio St. 33. See *ante*, p. 234, § 8. The provision of the constitution of the United States, "that full faith and credit shall be given in each State to the public records and judicial proceedings of every other State," cannot be construed as prohibiting a State from passing a law barring a right of action from lapse of time, on the record of a judgment of another State. *Randolph v. King*, 2 Bond (C. C.), 104. And by statute, in many of the States, the judgments and decrees of sister States are barred. See *Allison v. Nash*, 16 Tex. 560; *Brian v. Tims*, 10 Ark. 597; *Van Alstine v. Lemons*, 19 Ill. 394; *Boyd v. Barrenger*, 23 Miss. 269; *McElmoyle v. Cohen*, 13 Pet. (U. S.) 312. It is held in Georgia that, on a revived judgment from another State, the statute of limitations begins to run from the date of such revival, and not from the date of the original judgment. *Fagan v. Bently*, 32 Ga. 534. The California statute of limitations only runs against foreign judgments from the time when execution could issue on them. *Parke v. Williams*, 7 Cal. 247.

In Arkansas, the statute commences to run against a judgment by a justice of the peace, when the transcript is filed in the circuit court, from the date of the filing, and not from the date of the judgment

itself. *Burr v. Engles*, 24 Ark. 283. In South Carolina, it was held that an action on a magistrate's judgment could not be brought so long as it might be enforced by execution a year and a day from its date; and that, therefore, the statute did not begin to run until the expiration of that time. *Vandiver v. Hammet*, 4 Rich. (So. Car.) 509. But it was held that the period of time (twenty years), which raises the presumption that a judgment of a court of record is satisfied, begins when the judgment is entered up, and not when the last renewal of *fi. fa.* is tested, or loses its active energy. *Dillard v. Brian*, 5 Rich. (So. Car.) 501. And according to the decided weight of American authority at least, debt will lie on a judgment within the year and day. *Kingsland v. Forrest*, 18 Ala. 519; *Meason's Estate*, 4 Watts (Penn.), 341; *Denison v. Williams*, 4 Conn. 402; *Mullikin v. Duvall*, 7 Gill & J. (Md.) 355; *Clark v. Goodwin*, 14 Mass. 237. And it is therefore held, that the time within which an execution may issue, is to be counted in the time necessary to bar an action on the judgment. *McConnico v. Stallworth*, 43 Ala. 389.

The California statute of limitations requires an action on a judgment to be brought within five years; but when a judgment is rendered payable in installments, the time begins to run from the period fixed for the payment of each installment as it becomes due. *De Uprey v. De Uprey*, 23 Cal. 352.

In Louisiana, a judgment becomes final from the date of the signature of the judge; and if ten years are allowed to elapse from the date of such signature before citation of revival is served on the defendant, it is prescribed. And the delay caused by an appeal will not be counted in favor of the judgment creditor, to defeat the plea of prescription. *Walker v. Hays*, 23 La. Ann. 176.

§ 17. **Penalties.** An action for a penalty incurred under a by-law made by virtue of a royal charter under the great seal, is not an action of debt grounded upon a contract without specialty, within the statute of 21 James I, and, therefore, a plea of the statute bars the recovery of the penalty if the action is not commenced within six years after it was incurred. *Tobacco Pipe Makers v. Loder*, 16 Q. B. 765.

In Ohio, a city ordinance making an assessment for grading and paving a street provided that the owners of lots on which the assessments were made should severally pay the same within twenty days from the date of the ordinance, or be subject to the interest and penalty allowed thereon by law. An action to enforce the lien of such assessment against a lot, commenced more than six years after the date of the ordinance, but within six years after the expiration of the twenty days,

was held not to be barred by the statute of limitations. *Reynolds v. Green*, 27 Ohio St. 416.

A statutory action to recover back money lost upon a bet or wager was held to be subject to the limitation prescribed for actions for a penalty or forfeiture. *Cooper v. Rowley*, 29 Ohio St. 547.

In an action in a State court to recover back usurious interest charged by a national bank, a State statute limiting the time within which actions to recover excessive interest may be brought, does not apply. And the suit may be brought at any time within six years, which is the period of limitation found in the act of congress creating national banks, and applied to the action for the penalty for taking usurious interest. *Lucas v. Government Nat. Bank of Pottsville*, 78 Penn. St. 228; S. C., 21 Am. Rep. 17.

§ 18. **Real property.** Prior to the statute of 32 Hen. VIII, ch. 2 (1540), actions for the recovery of land and other things real were limited from some particular memorable event. By the statute a more proper course was adopted, limiting such actions according to a fixed interval of antecedent time. Afterward, by the statute of 21 James I, ch. 16 (1623), it was enacted among other things that no person should make *entry* into lands, tenements, or hereditaments, but within twenty years after his right should first accrue. See 3 Bl. Com. 189; Ang. on Lim., § 13. From this last enactment it resulted that the same period of twenty years also became the limitation in every action of ejectment, inasmuch as the right to bring that action is founded upon the right of entry. *Id.* And see Vol. 3, tit. *Ejectment*. The statute of 21 James I was in force in England until the statute of 3 & 4 Will. 4, ch. 27, was substituted therefor, and it was generally adopted by the original American States, when they were colonies; and, whenever it has been since superseded by other acts of limitation, which do not essentially vary from it in respect to land, they are to be construed as that statute. See *ante*, p. 225, § 2, and cases cited; *Walden v. Heirs of Gratz*, 1 Wheat. 292; *Potts v. Gilbert*, 3 Wash. (C. C.) 475. The right of entry and the right to maintain ejectment are said to be so nearly alike, in a legal sense, that one may be used in that sense for the other. This was so held under the statute of James, and may be deemed the settled construction in this country. *Henderson v. Griffin*, 5 Pet. (U. S.) 158; Ang. on Lim., § 369. To determine, therefore, whether or not the party is barred of his right to maintain an action of ejectment, it is requisite to determine when his right of entry accrued. *Clark v. Vaughan*, 3 Conn. 191. And see fully as to this point, Vol. 3, tit. *Ejectment*. As a general doctrine, it is now well settled that what the law deems a perfect possession, if continued without interruption during the whole period

which is prescribed by the statute for the enforcement of the right of entry, is evidence of a fee (*Leffingwell v. Warren*, 2 Black [U. S.], 599; *Dennis v. Barnard*, Cowp. 597; *Bradstreet v. Huntington*, 5 Pet. [U. S.] 438); that is, the title to the property will be regarded as vested in the possessor. *Trim v. McPherson*, 7 Cold. (Tenn.) 15; *Hopkins v. Calloway*, id. 37; *Key v. Jennings*, 66 Mo. 356; *Ridgeway v. Holliday*, 59 id. 444. The same doctrine is acted upon by courts of equity. Thus, it is said that, both on principle and authority, the laches and non-claim of the rightful owner of an equitable estate, for a period of twenty years (supposing it the case of one who must, within that period, have made his claim in a court of law, had it been a legal estate), under no disability, and where there has been no fraud, will constitute a bar to equitable relief, in analogy to the statute of limitations, if, during all that period, the possession has been held under a claim unequivocally adverse. *Elmendorf v. Taylor*, 10 Wheat. 168. See *ante*, p. 229, § 5. But to acquire title to land by the statute of limitations, it is requisite that there be an adverse possession of the land for the period of limitation, continuous in the party who first became the adverse possessor, or in him and his grantees and successors in interest. *San Francisco v. Fulde*, 37 Cal. 349. For it is a principle well established that when several persons enter on land in succession, the several possessions cannot be tacked so as to make a continuity of possession, unless there is a privity of estate, or the several titles are connected. *Melvin v. Proprietors of Locks*, 5 Mete. (Mass.) 15; *Doswell v. De La Lanza*, 20 How. (U. S.) 29; *Shaw v. Nicholas*, 30 Mo. 99; *Doe v. Brown*, 4 Ind. 143; *Morrison v. Hays*, 19 Ga. 294. Whenever one quits the possession, the seizin of the true owner is restored, and an entry afterward by another, wrongfully, constitutes a new disseizin. *Potts v. Gilbert*, 3 Wash. (C. C.) 475; *Pederick v. Searle*, 5 Serg. & R. (Penn.) 236. And when one has entered expressly or legally in subserviency to the title of the owner, the statute does not begin to run in favor of such occupant until the privity existing between him and the owner is severed by some unequivocal act. Until such act his possession does not become adverse. Mere declaration of an intention is insufficient. *Cadwalader v. App.*, 81 Penn. St. 194; *Frink v. Alsip*, 49 Cal. 103; *Williams v. Cash*, 27 Ga. 507; *Earley v. Sterrett*, 18 Tex. 113. Nor is this rule restricted to co-tenants; but it applies generally, whenever the title was originally taken and held in subserviency to the title of the real owner. *Bannon v. Brandon*, 34 Penn. St. 263. Where adjoining land-owners agree upon a line dividing their lands, and enter into possession and occupy according to such line, they will be concluded from afterward disputing such line as the true one; and the

rule is the same where parties, for a period of twenty years, acquiesce in such a line. *Hubbard v. Stearns*, 86 Ill. 35. Vol. 2, pp. 718, 719. For a full discussion of this branch of the subject, see *Adverse Possession*.

The statute of limitations commences running against a remainderman only from the termination of the particular estate. *Fogal v. Pirro*, 17 Abb. (N. Y.) 113; S. C., 10 Bosw. 100; *Gibson v. Jayne*, 37 Miss. 164; *Foster v. Marshall*, 22 N. H. 491; *Higgins v. Crosby*, 40 Ill. 260; *Bell v. McCawley*, 29 Ga. 355; *Bailey v. Woodbury*, 50 Vt. 166; *Woodson v. Smith*, 1 Head (Tenn.), 276. It does not commence to run against one holding under a patent from the government, until after the date of the patent (*Smith v. Garza*, 15 Tex. 150; *Farley v. Smith*, 39 Ala. 38. And see *Beach v. Gabriel*, 29 Cal. 580; *DeMiranda v. Toomey*, 51 id. 165); nor against a purchaser of land at a sheriff's sale until the sheriff's deed has been delivered to the purchaser; for until then, the deed does not take effect. *Jefferson v. Wendt*, 51 Cal. 573; *Watson v. New York Central R. R. Co.*, 6 Abb. (N. S.) 91; S. C. affirmed, 47 N. Y. (2 Sick.) 157. That the statute begins to run at the date of the sheriff's deed. See *Chalfin v. Malone*, 9 B. Monr. (Ky.) 496; *Keatts v. Fowler*, 22 Ark. 483, 488. It is held that when land is sold for non-payment of taxes, the statute begins to run in favor of the purchaser, as against a former owner who is not within the saving clause of the statute, from the date of the sale, whether such purchaser is in actual possession or not. *Mitchell v. Etter*, 22 id. 178. In Wisconsin, the statute begins to run from the time of the recording of the tax deed, whether possession has or has not been taken by the purchaser. *Knox v. Cleveland*, 13 Wis. 245; *Leffingwell v. Warren*, 2 Black (U. S.), 599.

Statutes of limitations do not begin to run in cases of mistake as to the quantity of land sold until the mistake is discovered. *Grundy v. Grundy*, 12 B. Monr. (Ky.) 269. And see *Ormsby v. Longworth*, 11 Ohio St. 653. Where one, having a right to use land for a specific purpose, perverts it to other uses, the statute begins to run in his favor only from the time of such perversion. *Rogers v. Stoeber*, 24 Penn. St. 186. Where an equitable estate is devised, to vest on the happening of a certain event, the statute will not begin to run against the devisee until such event. *Holt v. Lamb*, 17 Ohio St. 374. The statute, in order to bar the mortgagor's suit to redeem, does not begin to run until possession taken, nor even then, so long as the mortgagee expressly recognizes the right of redemption in the mortgagor. *Waldo v. Rice*, 14 Wis. 286. See *Rockwell v. Servant*, 63 Ill. 424. Adverse possession for the time prescribed by statute in Tennessee will not be

available as a defense to a proceeding by a city against property so possessed. *Memphis v. Lenore*, 6 Coldw. (Tenn.) 413. Where a railway company located its track on private property without paying for or securing the price of the property taken, it was held that the statute did not bar an action for the subsequent use of the property. *McClinton v. Pittsburg, etc., Railway Co.*, 66 Penn. St. 404.

Statutes of limitation do not run against the United States. See *ante*, p. 232, § 7. So long as the title to land, through which a stream of water flows, remains in the United States, there can be no use or enjoyment of the waters of the stream, which will avail the person so using, as a foundation for title by prescription against the grantee of the government. In order that such use may ripen into a prescriptive title, it must continue for the full period required by the statute of limitations after the title to the land has passed from the United States. *Union Mill, etc., Co. v. Ferris*, 2 Sawyer (C. C.), 176.

When a contract for the mutual exchange of lands does not contain a provision from which it can be inferred that one conveyance was to precede the other, the law implies that the conveyances are to be made concurrently, and the mutual covenants of the parties are dependent. Upon such a contract, the statute of limitations does not commence to run against the vendor until he has performed by giving a deed, nor against the purchaser until he has made a tender of the price. *Brennan v. Ford*, 46 Cal. 7.

The wife's remedy by action for her dower is not within the early English statutes of limitation (4 Kent's Com. 70; *Wakeman v. Roche*, Dud. [Ga.] 123; *Barnard v. Edwards*, 4 N. H. 107; *Spencer v. Weston*, 1 Dev. & Bat. [No. Car.] 213; *Guthrie v. Owen*, 10 Yerg. [Tenn.] 339. But see *Ramsay v. Dozier*, 1 Tread. Const. [So. Car.] 112; *Boyle v. Rowand*, 3 Des. [So. Car.] 555); and such action is, therefore, not to be deemed barred by the lapse of time, in the absence of a modern statutory provision prescribing the period of limitation. See *Chew v. Farmers' Bank*, 9 Gill (Md.), 361; *Berrien v. Conover*, 1 Harr. (N. J.) 107; *Tuttle v. Wilson*, 10 Ohio, 24; *Turney v. Smith*, 14 Ill. 242; *Torrey v. Minor*, 1 Sm. & M. (Miss.) Ch. 489; *Care v. Keller*, 77 Penn. St. 487; *Stidham v. Matthews*, 29 Ark. 650; *Robie v. Flanders*, 33 N. H. 524. By the English statute of 3 and 4 Will. IV, ch. 27, it is provided that no suit for dower shall be brought, unless within twenty years after the death of the husband; and that an account of the rents and profits of the dowable lands shall be limited to six years. The period of twenty years, within which to demand dower, is likewise prescribed by the Revised Statutes of New York. 1 R. S.

742, § 18. And see *Brewster v. Brewster*, 32 Barb. 428. As to this point, the statutes of the particular State should be consulted.

§ 19. **Sealed instruments.** The purpose of the statute of 21 James I was to limit the time for bringing actions on a simple contract, without writing under hand and seal. The language of the statute, as applicable to actions of debt, is "all actions of debt grounded on any lending or contract *without specialty*." Specialties are not within the evils intended, and actions of debt on specialty are not, therefore, limited by the statute. *Hodsden v. Harridge*, 2 Wms. Saund. 64, and note. Thus, bonds, being specialties, are held not to be within the statute. *Mayor, etc., v. Horner*, Cowp. 102; *Summerville v. Holliday*, 1 Watts, 507; *Clark v. Hopkins*, 7 Johns. 556; *Brown v. Houdlette*, 10 Me. 399. So, an *award*, under the hand and seal of the arbitrators, has been so far considered as being of the nature of a *specialty* as to be within the meaning of the statute (*Hodsden v. Harridge*, 2 Wms. Saund. 64); and it was therefore held that an action of debt on award was not barred by the statute. *Id.* Debt on an indenture reserving rent is not within the statute. *Pease v. Howard*, 14 Johns. 479; *McQuesney v. Hiester*, 33 Penn. St. 435. And see *Bailey v. Jackson*, 16 Johns. 210. And it is said that the plea of the statute to an ordinary action for a legacy has never been known. *Perkins v. Cartmell*, 4 Harr. (Del.) 270.

A contract under seal was made for the sale of land, and an agreement not under seal in connection with it was indorsed on it and made part of it. Afterward, the vendor stipulated by another indorsement under seal to comply with the contract, and it was held that this made the whole a specialty, so as to avoid the bar of the statute. *Ake and Feay's Appeal*, 74 Penn. St. 116. See, also, *Loring v. Whittemore*, 13 Gray, 228. And it has been held in Georgia, that an unsealed indorsement on a sealed instrument is a contract under seal. *Milledge v. Gardner*, 29 Ga. 700.

And while the term *specialty*, in the strict use of the word, was formerly regarded as only applicable to bonds, deeds, or other instruments under seal, it afterward came to be used in a much more comprehensive sense. And the term has long been used both in England and America in this more comprehensive sense as embracing debts upon recognizances, judgments and decrees and debts upon statute. *Stockwell v. Coleman*, 10 Ohio St. 33, 40. And see *Jones v. Pope*, 1 Wms. Saund. 38; *Shepherd v. Hills*, 32 Eng. Law & Eq. 533; *Lane v. Morris*, 10 Ga. 162; *Ward v. Reeder*, 2 Har. & M. (Md.) 154. As to judgments, see *ante*, p. 253, § 16. But a note is not a "specialty," within the statute of limitations, because it is secured by a mortgage.

Seymour v. Street, 5 Neb. 85. A promissory note, although secured by mortgage, remains a single contract. *Clarke v. Figes*, 2 Stark. 234; *Jackson v. Sackett*, 7 Wend. 94. And it is held in California that where an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by the statute of limitations, the remedy upon the mortgage is also barred. *McCarthy v. White*, 21 Cal. 495; *Low v. Allen*, 26 id. 144. See, also, *Belloc v. Davis*, 38 id. 242. On the other hand it has been held that where a mortgage was given to secure the payment of a simple contract debt, the statute limiting the time for commencing actions for the recovery of such debts was no bar to an action to foreclose a mortgage. *Elkins v. Edwards*, 8 Ga. 325; *Nevitt v. Bacon*, 32 Miss. 212; *Wiswell v. Baxter*, 20 Wis. 680; *Knox v. Galligan*, 21 id. 470; *Balch v. Onion*, 4 Cush. 559; *Cookes v. Culbertson*, 9 Nev. 199; *Longworth v. Taylor*, 2 Cin. (Ohio) 39. And see *Borst v. Corey*, 15 N. Y. (1 Smith) 505. In New Hampshire, a statute provides that when a note is secured by mortgage, the plaintiff may sue on the note so long as he has a right of action on the mortgage; and this provision extends to notes secured by mortgages of personal property. *Demerritt v. Batchelder*, 28 N. H. 533. See *Cross v. Gannett*, 39 id. 140.

By analogy to the statute of limitations, an artificial presumption has long been established, that where payment of a bond or other specialty was not demanded for *twenty years*, and there has been no circumstances to show that it was still acknowledged to be in existence, the jury are to presume payment at the end of twenty years. Ang. on Lim., § 93; *Oswald v. Legh*, 1 Term R. 271; *Tilghman v. Fisher*, 9 Watts, 442; *Jackson v. Pierce*, 10 Johns. 414; *Carr v. Dings*, 54 Mo. 95; *Perkins v. Hawkins*, 9 Gratt. (Va.) 656; *Hale v. Anderson*, 10 W. Va. 145. But if a shorter period, even a single day less than twenty years, has elapsed, the presumption of satisfaction from mere lapse of time does not arise; though in the latter case it may be inferred, where other circumstances render it probable. *Hutsonpillier v. Stover*, 12 Gratt. 588; *Sadler v. Kennedy*, 11 W. Va. 187. See *post*, p. 287, Art. 3.

In England, by statute of 3 and 4 Will. IV, ch. 42, it is now provided that all actions upon specialties shall be commenced within twenty years, and not after. So, in many of the States, statutory provisions exist limiting the time within which such actions must be brought. In Maryland, specialties were expressly provided for at an early day. See *Richards v. Maryland Ins. Co.*, 8 Cranch, 84; *Watkins v. Harwood*, 2 Gill & J. [Md.] 307, the period of limitation being fixed at twelve years. *Id.* And it is held that the statute begins to operate from the

time of the payment of money secured by a bond and not from the date of the bond. *Glasgow v. Porter*, 1 Har. & J. (Md.) 109; *Hall v. Creswell*, 12 Gill & J. (Md.) 36. See *Thurston v. Blackiston*, 36 Md. 501. Actions on guardians' bonds as well as on bonds of executors and administrators are limited by the statute, which begins to run from the time of passing the bonds, that is, their approval by the orphans' court, and not from the filing or the date. *State v. Miller*, 3 Gill (Md.), 335. In North Carolina, the statute begins to run upon a guardian's bond from the time of the ward's coming of age, and not from the time of demand. *State v. Harris*, 71 No. Car. 174. In Texas, the statute does not begin to run against an indemnity bond till judgment has been recovered against the party indemnified (*Illies v. Fitzgerald*, 11 Tex. 417); nor does it begin to run against a suit by the obligee for the specific performance of a title bond, until a demand and refusal to make title, or some act by the obligor indicating an intention to claim the land or repudiate the sale. *Year v. Cummins*, 28 id. 91.

In Indiana, a cause of action accrues upon the bond of a commissioner appointed to sell real estate, upon the failure of the commissioner to pay over the money within a reasonable time after he receives it, under the direction of the court. *Owen v. State*, 25 Ind. 107.

It is held to be no defense to an action for the breach of a covenant, that there has been a previous breach of another distinct covenant in the same agreement, an action upon which is barred by the statutes of limitations. *Keefer v. Zimmerman*, 22 Md. 274.

In Iowa, an action to foreclose a title bond, treating it as a mortgage, is barred in ten years from the time the cause of action accrued. *Day v. Baldwin*, 34 Iowa, 380. In Louisiana, the time for bringing action for the breach of a sheriff's official bond is two years from the date of the breach. *Kohler v. Walden*, 23 La. Ann. 299.

A bond given by a vendee of land to secure payment of the balance of the purchase-money is in the nature of a mortgage, and will be barred only where a mortgage would be. *Mahone v. Haddock*, 44 Ala. 92.

Where a mortgage fixes no time for redemption, it is redeemable immediately, and the statute runs against it from its execution. *Tucker v. White*, 2 Dev. & Bat. (No. Car.) Eq. 289.

§ 20. **Torts or wrongs.** When an injury, however slight, is complete as a legal injury at the time of the act, the period of limitation at once commences. *Kerns v. Schoonmaker*, 4 Ohio, Part 2, 331; *Fee v. Fee*, 10 id. 469; *Northrop v. Hill*, 57 N.Y. (12 Sick.) 351; S. C., 15 Am. Rep. 501. Thus, where a person has been guilty of negligence or a

breach of duty, the gist of the action is the negligence or breach of duty, and not the injury consequent thereon. The statute, therefore, begins to run from the negligence or breach, whether the action in point of form be case or assumpsit (*Argall v. Bryant*, 1 Sandf. [N. Y.] 98; *Lathrop v. Snellbaker*, 6 Ohio St. 276; *Ellis v. Kelso*, 18 B. Monr. (Ky.) 296; *Leroy v. Springfield*, 81 Ill. 114; *Howell v. Young*, 5 Barn. & C. 259; S. C., 2 Car. & P. 233; 8 Dowl. & Ry. 14); and the plaintiff's ignorance of the negligence or breach of duty cannot affect the bar of the statute. *Crawford v. Gaulden*, 33 Ga. 173. See *Derrickson v. Cady*, 7 Penn. St. 27. But when the act is not legally injurious until certain consequences occur, in other words if the cause of action is not the doing of the thing, but the resulting of damage only, the period of limitation is to be computed from the time when the party sustained the injury. *Bank of Hartford Co. v. Waterman*, 26 Conn. 324; *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765.

An action for negligence in setting a broken arm is an action arising *ex contractu* and not *ex delicto*, and is only barred by the statute limiting actions on contracts. *Staley v. Jameson*, 46 Ind. 159; 15 Am. Rep. 285.

An action for a continuous tort, as for maintaining a dam which kept the plaintiff's land flooded, is not barred because the tort was commenced more than three years (the prescribed period of limitation) before suit brought. *Spilman v. Roanoke Nav. Co.*, 74 No. Car. 675. But see *Kansas, etc., R. R. Co. v. Muhlman*, 17 Kans. 224.

In an action under the Kentucky statute for seduction, the limitation begins to run from the act of seduction. But in an action by the parent for loss of service and expense in consequence of the seduction of his daughter, the limitation begins to run from her recovery after the birth of the child. *Wilhoit v. Hancock*, 5 Bush (Ky.), 567. See *Hancock v. Wilhoit*, 1 Duv. (Ky.) 313.

A statute providing that an action to recover for the death of one caused by the wrongful act of another, "must be commenced within two years," to which limitation there are no exceptions, must be construed as meaning two years from the death of the person. *Hanna v. Jeffersonville R. R. Co.*, 32 Ind. 113. Where goods held for safe-keeping are destroyed, the statute begins to run from the time of the loss, or at the latest, from the time the owner has notice of the loss, and not from the time of demand. *Cohrs v. Fraser*, 5 So. Car. 351. And see *Finn v. Western R. R. Co.*, 102 Mass. 283.

In trover, the statute runs from the time of conversion, and not from the time of sale. *Denys v. Shuckburgh*, 4 Younge & Col. 42. But in an action of trover, to recover a United States certificate, sold

under execution, it was held that the statute began to run from the date of the sheriff's sale. *Horsefield v. Cost*, Add. (Penn.) 152. In trover for taking goods under an irregular execution, the statute begins to run from the time the goods were taken, and not from the time that the execution was set aside. *Read v. Markle*, 3 Johns. 523.

The seizure by a sheriff of property which he supposes to be that of a debtor against whom he has a lawful process, is an act done in his official capacity, within the meaning of a statute limiting the time for commencing suit for such acts, notwithstanding that the property in fact belonged to another person. *Cumming v. Brown*, 43 N. Y. (4 Hand) 514. As to the time when the liability of the sheriff attaches for neglect to account for moneys collected on execution, and a consequent right of action accrues against him, the decisions of the courts of the different States are not harmonious. In Massachusetts, and in some of the other States, it is held that the cause of action does not accrue till demand of payment is made upon him, and, consequently, that the statute only then commences running. *Weston v. Ames*, 10 Mete. 244; *Pitkin v. Rosseau*, 14 La. Ann. 511; *Church v. Clark*, 1 Root (Conn.), 303. See *Welles v. Russell*, 38 Conn. 193. In Georgia, it is held that the action accrues and that the statute commences to run in favor of the sheriff from the time the money was received by him on the execution. *Thompson v. Central Bank of Georgia*, 9 Ga. 413. And see *Edwards v. Ingraham*, 31 Miss. 272. While in Alabama it is held that the cause of action accrues and the running of the statute commences from the time the fact of the collection is made to appear by the return of the execution satisfied. *Governor v. Stonum*, 11 Ala. 679. So in Missouri, the cause of action on the bond of a sheriff for failing to account for moneys collected by him does not accrue, so as to put in motion the statute of limitations, until there has been either a demand of payment by the parties in interest, or until the officer has made a proper return or report to the court ordering the sale, of the moneys realized therefrom. *State v. Minor*, 44 Mo. 373.

It has been held that where a sheriff, contrary to his instructions, neglects to attach sufficient property, as he might have done, a cause of action arises against him on the return of the writ, and the statute then begins to run, and not from the time when, by a levy of the execution, the insufficiency of the property is ascertained. *Garlin v. Strickland*, 27 Me. 443; *Betts v. Norris*, 21 id. 314. But see *contra*, *Bank of Hartford Co. v. Waterman*, 26 Conn. 324.

Where the sheriff has taken insufficient sureties in replevin, the statute commences running from the time when the plaintiff in

replevin, after judgment for a return, has failed to return upon demand the property replevied. *Harriman v. Wilkins*, 29 Me. 93. And the right of action of an attorney against a sheriff for taking insufficient bail accrues when the attorney's lien for his costs is perfected by the rendition of judgment. *Newbert v. Cunningham*, 50 id. 231.

In Indiana, the concealment of the fact that a person is liable to an action, to prevent the running of the statute of limitations, must be of a positive and affirmative character, calculated to prevent the discovery existence (*Robinson v. State*, 57 Ind. 113. See, also, *ante*, p. 243, § 13); its of the liability, as by hiding the fact, or avoiding inquiry concerning and the fact that the defendant in an action for criminal conversation concealed the same by persuading the plaintiff's wife to deny the commission of the wrong, is insufficient to avoid the running of the statute. *Jackson v. Buchanan*, 59 Ind. 390.

§ 21. **Merchants' or mutual accounts.** The exception as to merchants' accounts in the statute of limitations (21 James I, ch. 16, § 3), embraced in the words "all actions of account, and upon the case *other than* such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants," was incorporated into the early statutes of limitation in this country. And it has been held that this exception in the statute expressly, and without any qualification, excludes merchants' accounts, and that, if the action concerned the trade of merchandise between merchant and merchant, no length of time is a bar, as the exception prevents its application to such a case. See *Franklin v. Camp*, 1 Cox (N. J.), 196; *Bass v. Bass*, 8 Pick. 187; *M'Lellan v. Crofton*, 6 Me. 398; *Mandeville v. Wilson*, 5 Cranch, 15; *Stiles v. Donaldson*, 2 Dall. (Penn.) 264. But see *Murray v. Coster*, 20 Johns. 576. Such, also, is the construction given to the words of the exception in the later English cases. *Robinson v. Alexander*, 8 Bligh (N. S.), 352. And see *Forbes v. Skelton*, 8 Sim. 33, 35; *Inglis v. Haigh*, 8 Mees. & W. 781. But merchants' accounts, to come within the exception in the statute, must be between merchants at the time the cause of action accrues, unsettled and mutual, and consisting of debts and credits for merchandise. *Fox v. Fisk*, 7 Miss. (6 How.) 328; *Smith v. Dawson*, 10 B. Monr. (Ky.) 112; *May v. Pollard*, 28 Tex. 677. A single transaction between two merchants is not within the exception (*Marseilles v. Kenton*, 17 Penn. St. 238; *Davis v. Tiernan*, 3 Miss. [2 How.] 786); and accounts, between one partner and another, for a settlement of the partnership accounts, do not concern the trade of merchandise between merchant and merchant, and are not embraced by the exception in the statute. *Coalter v. Coalter*, 1 Rob. (Va.) 79; *Wilhelm v. Caylor*, 32 Md. 151;

Manchester v. Mathewson, 3 R. I. 237. Nor can the exception be applied to *banking* institutions. *Farmers', etc., Bank v. Planters' Bank*, 10 Gill & J. (Md.) 442. And "merchants' accounts," though not barred by the statute, may, like specialties, be presumed to have been settled, after the lapse of twenty years. See *Hancock v. Cook*, 18 Pick. 30. Where a statute provides that actions for account shall be brought "within six years next after the cause of such actions, and not after," an action will be well brought Oct. 6, 1868, on an account, the last item of which was dated Oct. 6, 1862. *Morgan v. Frick*, 73 Penn. St. 137; 13 Am. Rep. 731, 733, note.

The exception as to merchants' accounts, above noticed, has not been retained in the revised acts of limitation in this country, and questions respecting its proper application are no longer of much practical utility. But it has long been a settled doctrine that where there are mutual accounts between two persons, whether merchants or not, and there are some items, or any one item, within the period of limitation, the whole account will be taken out of the statute of limitations. *Van Swearingen v. Harris*, 1 Watts & S. (Penn.) 356; *Davis v. Smith*, 4 Me. 337; *Wilson v. Calvert*, 18 Ala. 274; *Taylor v. McDonald*, 2 Mills (So. Car.), 178; *Penn v. Watson*, 20 Mo. 13; *Sickles v. Mather*, 20 Wend. 72; *Helms v. Otis*, 5 Lans. (N. Y.) 137; *Chambers v. Marks*, 25 Penn. St. 296; *Beltzhoover v. Yewell*, 11 Gill & J. (Md.) 212; *Moore v. Mauro*, 4 Rand. (Va.) 488; *Ex parte Peaber*, 1 Deacon's Bankr. Rep. 551. This doctrine has been placed upon the ground that such accounts come within the equity of the exception in respect to merchants' accounts. See Ang. on Lim., § 143. Another ground, and the one chiefly and generally relied upon is, that every new item and credit in an account, given by one party to the other, is an *admission* of there being some unsettled account between them, the amount of which is afterward to be ascertained; and any act which the jury may consider as an acknowledgment of its being an open account, is sufficient to take the case out of the statute. *Cutlin v. Skoulding*, 6 Term R. 189; *Cogswell v. Dolliver*, 2 Mass. 217; *Bradford v. Spyker*, 32 Ala. 134. But see *Blair v. Drew*, 6 N. H. 235; *Lowe v. Dowbarn*, 26 Tex. 507.

The rule that items, within the period of limitation, draw after them other items, is strictly confined to *mutual* accounts, or accounts between two parties which show a reciprocity of dealing. *Hallock v. Losee*, 1 Sandf. (N. Y.) 220; *Turnbull v. Strohecker*, 4 McCord (So. Car.), 210; *Ross v. Ross*, 6 Hun (N. Y.), 80; *Fraylor v. Sonora, etc., Co.*, 17 Cal. 594. It is not sufficient that there are items on *both* sides of the account; there must be items, within the period of limitation, on both sides. *Gulick v. Princeton, etc., Turnpike Co.*, 14 N. J. Law, 545; *For*

v. *Fisk*, 7 Miss. (6 How.) 346; *Chipman v. Bates*, 5 Vt. 143. A payment, whether it be made in money or of an article of personal property of a stipulated value, made on an account and intended as a payment, and not as a set-off *pro tanto*, does not make an account mutual. *Norton v. Larco*, 30 Cal. 126; *Adams v. Patterson*, 35 id. 122. And see *Ingram v. Sherard*, 17 Serg. & R. 347; *Dyer v. Walker*, 51 Me. 104; *Warren v. Sweeney*, 4 Nev. 101; *Prenatt v. Runyon*, 12 Ind. 174; *McCulloch v. Judd*, 20 Ala. 703; *Peck v. New York, etc., Steamship Co.*, 5 Bosw. (N. Y.) 226. It is, however, held that in matters of account, one party may credit the other items that represent a legal indebtedness that should go into the account, and thereby avoid the bar of the statute, although the other party has not charged the items, and insists that they are not to be allowed him. *Davis v. Smith*, 48 Vt. 52. And where the defendants, being indebted to the plaintiffs on account, delivered to them an article of personal property, for which the latter gave the former credit at a specified valuation, it was held that thereby the account between the parties became a mutual, open and current account, consisting of reciprocal demands between them. *Norton v. Larco*, 30 Cal. 126. So, an account consisting of items in favor of one party, for rents collected and for services, and items in favor of the other party, for bonds and notes and accumulating interest, is a mutual account. *Ross v. Ross*, 6 Hun (N. Y.), 80. But a sale of goods to one holding a due bill of the vendor does not make out a case of mutual accounts such as will prevent the running of the statute. *Clark v. Maguire*, 35 Penn. St. 259. So, where A sells goods to B for cash, and other goods to be paid for in goods, and B delivers to A goods more than sufficient to pay for the goods which he received to be paid for in goods, this is not a mutual account between the parties, so that one item being within the period of limitation will take the whole out of the statute. *Lowber v. Smith*, 7 id. 381. So, where the defendant had been for many years the landlord of the plaintiff, but without collecting or demanding the rent, and the plaintiff afterward became landlord and the defendant hired from him a part of the premises, for a year, at an entire rent, it was held that these circumstances did not constitute a case of a mutual, open and current account, so as to prevent the running of the statute against so much of the defendant's claim as accrued six years prior to his interposition of his counter-claim in the action for rent due from him. *Huebner v. Roosevelt*, 6 Daly (N. Y.), 337. And, where the statute has run several years against a current account, its transfer to a new party, without notice to or recognition by the debtor, will not bring it into an account between the debtor and such new party,

as a new item, but it will be barred, as if no transfer had been made. *Green v. Ames*, 14 N. Y. (4 Kern.) 225.

In an action on an open and mutual account, if one item is for a breach of an agreement which occurred more than six years before the date of the writ, and the last item is within the six years, and the defendant pleads the statute, but does not object that the first item is not properly the subject of an account, the plaintiff may recover both items. *James v. Clapp*, 116 Mass. 358.

Accounts between the several members of a mercantile partnership, unless all the items are on one side, are mutual accounts, which the statute does not bar if one item is within the period of limitation. *Bradford v. Spyker*, 32 Ala. 134. And the claim of a surviving partner upon the estate of his deceased partner for contribution is not barred, if one of the items of his account is within such period. *Cannon v. Copeland*, 43 id. 201.

When the parties have stated, liquidated, and adjusted the accounts, and thus ascertained the balance, it ceases to be an account. Such balance is a result in which previously existing accounts have become merged and lost their character and existence. *McLellan v. Crofton*, 6 Me. 307. See Vol. I, p. 191. And where an action is brought to recover a balance due upon a mutual, open, and current account between the parties, the cause of action must be deemed to have accrued from the date of the last item proved on either side, from which time the statute of limitations commences to run. *Sanders v. Sanders*, 48 Ind. 84; *Mills v. Davies*, 42 Iowa, 91; *Hagar v. Springer*, 63 Me. 506. The balance itself may, however, be carried forward into a new mutual account; and if the account is thus renewed and continued, the statute will be a bar to the *items* of the first account, though the balance will be saved (*Toland v. Sprague*, 12 Pet. 300; *Chace v. Trafford*, 116 Mass. 529; S. C., 17 Am. Rep. 171; Ang. on Lim., § 151); that is, if six years have elapsed since the adjustment of the former account, and it should then be found that the balance was incorrect, and an action brought for the recovery of a different balance, the statute may be pleaded. Id. Thus, the treasurer of a town, who has held the office for many consecutive years, and has accounted with the town by annual settlements, carrying forward the balance of each year's account into the new account, is barred from showing errors and omissions in an account rendered by him more than six years before the date of the writ. *Belchertown v. Bridgman*, 118 Mass. 486.

In Maryland, according to the uniform course of decisions in that State, in order to remove the bar of the statute there must be a new promise, or a distinct acknowledgment of a present subsisting debt or

liability, from which a new promise will be inferred. And it was held in an action on an open account to which there was a replication of the statute of limitation to a plea of set-off, that the fact that one item in the account current pleaded as set-off, was within the statutory limit, did not withdraw the whole account from the operation of the statute. *Sprogle v. Allen*, 38 Md. 331.

In Louisiana, where an account is not shown to be a stated account, and is to be regarded as an open one, it is prescribed by three years. *Goodman v. Rayburn*, 27 La. Ann. 639.

In Texas, where there are mutual accounts (not between merchant and merchant, their factors and servants), of which some of the items have been due more than two years before the commencement of the suit, such items are barred by limitation, notwithstanding there may be other items in the accounts not within the bar of the statute. *Lowe v. Dowbarn*, 26 Tex. 507. But see *Ring v. Jamison*, 66 Mo. 424.

§ 22. **Trustees.** Time does not, in general, commence to run against a suit to enforce an express trust, until the trustee by word or act denies the trust, and the beneficiary has notice of the denial. *Jones v. McDermott*, 114 Mass. 400; *Poe v. Domic*, 54 Mo. 119; *Nease v. Capehart*, 8 W. Va. 95; *Bigelow v. Catlin*, 50 Vt. 408; *Gebhard v. Sattler*, 40 Iowa, 152; *Perkins v. Cartmell*, 4 Harr. (Del.) 270; *Hunter v. Hubbard*, 26 Texas, 537; *Robson v. Jones*, 27 id. 266; *Boone v. Chiles*, 10 Pet. 177; *Seymour v. Freer*, 8 Wall. 202; *Cunningham v. McKindley*, 22 Ind. 149. If A conveys land to B, and the deed provides that B shall reconvey to him, B holds the land in trust, and the statute does not commence running on A's right to a reconveyance until B repudiates the trust and A is informed of it. *Hearst v. Pujol*, 44 Cal. 230. But while the statute of limitations may have no application to a technical and continuing trust, which is subject to inquiry in a court of equity only, and the question arises between the trustee and the *cestui que trust*. See *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607; *ante*, p. 229, § 5. Yet it does apply to a trust in respect to which there is a remedy at law. The *Governor v. Woodworth*, 63 Ill. 254. And see *Cocke v. McGinnis*, Mart. & Y. (Tenn.) 361; *Paff v. Kinney*, 1 Bradf. (N. Y.) 1; *Zacharias v. Zacharias*, 23 Penn. St. 452; *Presley v. Davis*, 7 Rich. (So. Car.) Eq. 105. It has been repeatedly held that a trust raised by implication of law is within the operation of the statute of limitations. *Manion v. Titsworth*, 18 B. Monr. (Ky.) 582; *Walker v. Walker*, 16 Serg. & R. 379; *Sheppards v. Turpin*, 3 Gratt. (Va.) 373; *Edwards v. University*, 1 Dev. & Bat. (No. Car.) Eq. 325; *McClane v. Shepherd*, 21 N. J. Eq. 76; *McDowell v. Goldsmith*, 6 Md. 319; *Wilmerding v. Russ*,

33 Conn. 67. And where a person claiming personal property, or the profits of real estate, is turned into a trustee by implication, or by operation of law, the right of action by the *cestui que trust* will, as a general rule, be subject to the same limitation as a demand purely legal. *Hawley v. Cramer*, 4 Cow. 717; *Martin v. Bank*, 31 Ala. 115; *Ashurst's Appeal*, 60 Penn. St. 290. Where a father receives a legacy of his minor child a trust is raised by operation of law, in respect to the funds so received, which is within the operation of the statute, the father having no right, as natural guardian of his children, to intermeddle with their estate. *Haynie v. Hall*, 5 Humph. (Tenn.) 290. So, the trust in the vendor of land, raised by the payment of the purchase-money, in favor of the vendee, is implied only, and, though not within the statute of limitations, will be barred by a great lapse of time unless some disability of the plaintiff is clearly proved, accounting for the delay. *Tate v. Conner*, 2 Dev. (No. Car.) Eq. 224. And, as a general rule, one who receives money as a *quasi* trustee, as for the use of those to whom it belonged, not as acting under a continuing or express trust, and whose duty it is to pay over immediately on its receipt, is liable to an action at law, and the statute begins to run from the time of the receipt. *Berry v. Pierson*, 1 Gill (Md.), 234.

The principle that the statute begins to run in favor of a trustee after he has disavowed the trust, and made known his disavowal to the *cestui que trust*, does not apply when the *cestui que trust* is under undue influence, proceeding from the trustee. *Keaton v. McGwier*, 24 Ga. 217; *Wellborn v. Rogers*, id. 558. But where it is attempted to avoid the bar of the statute, on the ground that the possession of the defendant is fiduciary, it must be shown that it is fiduciary in respect to the plaintiff, or those under whom he claims; it is not sufficient that it is fiduciary as to a third person. *Spotswood v. Dandridge*, 4 Hen. & M. (Va.) 139. And when a trustee has closed his trust relation to the property and to the *cestui que trust*, and parted with all control of the property, the statutes of limitation run in his favor, notwithstanding it is an express trust. *Clarke v. Boorman*, 18 Wall. 493; *Starke v. Starke*, 3 Rich. (So. Car.) 438.

Between the vendor and purchaser by bond for title, a trust relation exists, and where this is continued by special agreement, it is held to postpone the time when the statute will commence to run against any right of the purchaser to recover back the purchase-money. *White v. Tucker*, 52 Miss. 145. A trust created by deed to secure the payment of notes, prevents the operation of statute; and although the notes become barred, it is held that a sale of the land by the trustee will vest a

good title in the purchaser. *Sprague v. Ireland*, 36 Tex. 654; *Williams v. Durst*, 35 id. 421.

Where the trustee of a married woman, having authority so to do, loans money to a stranger, the latter knowing that it is a trust fund, and the transaction is not tainted with fraud, the statute of limitations is a good defense to the stranger, as well in equity against the *cestui que trust*, as at law against the trustee. *Mason v. Mason*, 33 Ga. 435.

An executor and trustee, charged with the execution of an express trust, cannot avail himself of the statute of limitations, when called to account for the administration of his trust in a court of equity, but the action must be brought within a reasonable time, which will be determined by the circumstances. *Brinkley v. Willis*, 22 Ark. 1. But an executor who has not proved the will, but who is permitted by his co-executors, who have proved it, to take into his hands funds of the estate, does not become a trustee as to them of the property so received; and the statute will not bar a suit in equity against him, which is not brought within the limited time. *Marsh v. Oliver*, 14 N. J. Eq. 259. See Vol. 3, pp. 235-273, tit. *Executors and Administrators*.

It has been held that no action accrues against an administrator in his individual capacity until there has been some violation of his trust, nor against the sureties on his bond until there has been some breach of the condition of the bond; and then the statute of limitations begins to run from the date of such violation and breach. *Carr v. Catlin*, 13 Kans. 393. In Alabama, the statutory bar in favor of sureties of executors, administrators, and guardians, is to be computed from the judicial ascertainment of the principal's default, and not from the date of the misfeasance or malfeasance for which the surety is sought to be charged. *Fretwell v. McLemore*, 52 Ala. 124.

§ 23. **Set-off.** See *ante*, p. 265, § 21. The statute of limitations operates against a demand equally, whether it be sued upon, or brought in by way of set-off. *King v. Coulter*, 2 Grant's (Penn.) Cas. 77; *Nolin v. Blackwell*, 31 N. J. Law, 170. The rule is, if the defendant pleads a set-off, the plaintiff may reply the statute, which will be a bar; or, if the defendant, under the plea of the general issue, in England, or in this country, under the plea of payment, give the plaintiff notice of his intention to give it in evidence, the plaintiff, after it is given in evidence, may object the statute of limitations to it. *Hinkley v. Walters*, 8 Watts, 260; *Harwell v. Steele*, 17 Ala. 372; *Trimyer v. Pollard*, 5 Gratt. (Va.) 460; *Ruggles v. Keeler*, 3 Johns. 263. But the statute is not a bar to a set-off in cases under the act of limitation (21 James I, ch. 16, § 3), unless the six years have expired before the action is brought. *Walker v. Clements*, 15 Q. B.

1046. And where there are cross-demands between parties, which accrued nearly at the same time, both of which would be barred by the statute, and the plaintiff has saved the statute by suing out process, but the defendant has not, the defendant may nevertheless set off his demand. *Ord v. Ruspini*, 2 Esp. 569. See *Hunt v. Spaulding*, 18 Pick. 521. Where an administrator pleads a set-off, which is barred by the statute, it is no answer to the objection of the statute, that he is allowed, as administrator, nine months to collect the debts, as, during the nine months, he may sue, though he cannot be sued. *Turnbull v. Strohecker*, 4 McCord (So. C.ar), 210. See Vol. 3, pp. 235-273, tit. *Executors and Administrators*.

ARTICLE II.

OF EXEMPTIONS AND DISABILITIES.

Section 1. In general. It has been very generally held, that no exception to the statute of limitations can be claimed, unless it is expressly mentioned in the statute. A saving or exception, not found in the statute, will not be implied. *Howell v. Hair*, 15 Ala. 194; *The Sam Slick*, 2 Curtis (C. C.), 480; *Baines v. Williams*, 3 Ired. (No. Car.) 481; *United States v. Maillard*, 1 Benedict, 459; *Warfield v. Fox*, 53 Penn. St. 382; *Favorite v. Booher*, 17 Ohio St. 548; *Dozier v. Ellis*, 28 Miss. 730; *Wells v. Child*, 12 Allen, 333; *Bucklin v. Ford*, 5 Barb. 393. So, it is a settled rule, under all the British statutes of limitation, that when the statute has once commenced to run, its course will not be impeded or its operation suspended by any subsequent disability. *Smith v. Hill*, 1 Wils. 134; *Cotterell v. Dutton*, 4 Taunt. 826; *Rhodes v. Smethurst*, 4 Mees. & W. 42; S. C. affirmed, 6 id. 351. The same rule has generally prevailed in this country (*Peck v. Randall*, 1 Johns. 165; *Dillard v. Philson*, 5 Strobb. [So. Car.] 213; *Byrd v. Byrd*, 28 Miss. 144; *Ruff v. Bull*, 7 Har. & J. [Md.] 14; *Wright v. Scott*, 4 Wash. [C. C.] 16; *Pinckney v. Burrage*, 31 N. J. Law, 21); and a party claiming the benefit of the exceptions in the statute can only avail himself of the disability which existed when the right of action first accrued. *Id.*; *Hogan v. Kurtz*, 94 U. S. (4 Otto) 773. But see *Hays v. Cuge*, 2 Tex. 501. He cannot avail himself of a succession of disabilities. *Butler v. Howe*, 13 Me. 397; *Mercer v. Selden*, 1 How. (U. S.) 37; *Keeton v. Keeton*, 20 Mo. 530; *Ashbrook v. Quarles*, 15 B. Monr. (Ky.) 130; *Fritz v. Joiner*, 54 Ill. 101. Nor can there be any tacking of disabilities existing in different persons, as the mother's upon that of the children. *Mitchell v. Berry*, 1 Mete. (Ky.) 602. And see *Bozeman v. Browning*, 31 Ark. 364. But if several disabilities exist

together at the time when the right of action accrues, the statute does not begin to run until the party has survived them all. *Stuart v. Mellish*, 2 Atk. 610; *Butler v. Howe*, 13 Me. 397. And see *Robertson v. Wurdeman*, 2 Hill (So. Car.), 324; *Jordan v. Thornton*, 7 Ga. 517. And if, after the statute has begun to run, the right to sue and the liability to be sued meet by act of law in the same person, the running of the statute is suspended. *Seagram v. Knight*, 36 L. J. Ch. 918.

The statute has never been so construed as to prevent a person laboring under any disability from suing at any time during the disability. The rule is, that during the continuance of a disability the party *may*, but is not obliged to commence his action. *Chandler v. Vilett*, 2 Wms. Saund. 120. It was accordingly held that, if a party, who is in prison when the cause of action accrues, commences an action after six years have elapsed, but during the continuance of the imprisonment, the operation of the statute is barred by the saving clause. *Piggott v. Rush*, 4 Ad. & El. 912; S. C., 6 Nev. & M. 376. See, also, *Milliken v. Marlin*, 66 Ill. 13.

A party, who claims that he is exempt from the operation of the statute by reason of his disability, is bound to prove it strictly. *Hall v. Timmons*, 2 Rich. (So. Car.) Eq. 120.

§ 2. **Absence from the State.** The words "beyond the seas" are construed to be synonymous in legal import with the words "out of the realm," or "out of the land," or "out of the territories," and are not to be taken literally. *Ruckmaboye v. Mottichund*, 8 Moore's P. C. C. 4; 32 Eng. L. & Eq. 84; *Anon.*, 1 Show. 91. And it may be considered as an established general rule that, in this country, "beyond seas" and "out of the State" are analogous expressions, and must have the same meaning. *Murray v. Baker*, 3 Wheat. 541; *Faw v. Roberdeau*, 3 Cranch, 174; *Stephenson v. Doe*, 8 Blackf. (Ind.) 508; *West v. Pickesimer*, 7 Ohio, Part 2, 235; *Denham v. Holeman*, 26 Ga. 182; *Galusha v. Cobleigh*, 13 N. H. 79; *Pancoast v. Addison*, 1 Har. & J. (Md.) 350. In the Kentucky statute of limitations the term "out of the country" is substituted for the term "beyond seas," and is construed to mean "out of the State." *Mansell v. Israel*, 3 Bibb (Ky.), 510. But in Pennsylvania, the term "beyond seas" is construed to mean, without the limits of the United States. *Gonder v. Estabrook*, 33 Penn. St. 374. And the same construction is given to the term in Missouri. *Keeton v. Keeton*, 20 Mo. 530.

The act of limitations of 21 James I was no bar to a party, whether a subject of the realm or a *foreigner*, who was not in England at the time the cause of action accrued, and who continued resident abroad. *Strithorst v. Graeme*, 2 W. Bl. 723; S. C., 3 Wils. 145; *Le Veux v.*

Berkeley, 2 Dowl. & L. 31; S. C., 5 Q. B. 836; *Lafond v. Ruddock*, 13 C. B. 813. See, also, *Paine v. Drew*, 44 N. H. 306. But if one plaintiff is abroad, and the others in England, the action must be brought within six years after the cause of action arises. *Perry v. Jackson*, 4 Term R. 516. The exception in the above-named statute as to persons "beyond seas," has been construed as applicable only to the case where the creditors were beyond seas, and not where the debtors were. *Cheeveley v. Bond*, 1 Show. 341; *Nathans v. Bingham*, 1 Miles (Penn.), 164. But by statute 4 Anne, ch. 16, § 19, if any person shall at the time the cause of action accrues be beyond the seas, the person who is entitled to the action shall be at liberty to bring it against such person at any time within six years after his return. *Forbes v. Smith*, 11 Exch. 161. See *Vans v. Higginson*, 10 Mass. 29, 31 and notes; *Hysinger v. Bultzell*, 3 Gill & J. (Md.) 158; *Alexander v. Burnet*, 5 Rich. (So. Car.) 189. Under the last-mentioned statute it was held that, if a right of action accrued against several, one of whom was beyond seas, the statute did not run till his return or death, though the others had never been absent from the kingdom. *Townsv. Mead*, 16 C. B. 123; *Fannin v. Anderson*, 7 Q. B. 811. Under the New York statute of limitations, a debtor's absence from the State will prevent the statute from running, whether the debtor was absent from the State when the cause of action accrued, or left the State thereafter (*Richardson v. Curtis*, 3 Blachf. [C. C.] 385; *Dorr v. Swartwout*, 1 id. 179); and the statute does not run in favor of an absent debtor, though his joint debtor is always within the State. *Cutler v. Wright*, 22 N. Y. (8 Smith) 472. But it has been held otherwise in New Jersey. *Bruce v. Flagg*, 1 Dutch. (N. J.) 219.

In Kentucky, where a cause of action exists in behalf of a resident of the State against a non-resident, the mere fact of the debtor being a non-resident will not prevent the statute of limitations from running. But where the debtor is a resident of the State, and absents himself from it by removal or otherwise, the period of his absence will be omitted in the computation of the time. *Selden v. Preston*, 11 Bush (Ky.), 191. Where a note is made by a non-resident without the limits of Georgia, and the maker subsequently removes into that State, such period of non-residence will not be excluded in computing the time necessary to bar a suit upon the note. *Moore v. Carroll*, 54 Ga. 126. But where a defendant removes from the State with the intention not to return, but subsequently changes his purpose and returns, the time of his absence¹ should be deducted in ascertaining if the statutory bar attached. Otherwise, if he was simply temporarily absent. *Sedgwick v. Gerding*, 55 id. 264. Under the

Nebraska statute the right to sue is suspended by the absence or concealment of the debtor, the term of such absence or concealment is not to be counted. And if the debtor is personally dwelling out of the State, the fact that his wife and family remain within does not affect the question of his absence. *Seymour v. Street*, 5 Neb. 85. See, also, *Brown v. Rollins*, 44 N. H. 446; *Conrad v. Nall*, 24 Mich. 275. Where a person departed from the State leaving a residence therein, and afterward his family abandoned that dwelling-place and removed to the house of a relative in another county, it was held, in Missouri, that he had no usual place of abode within the State, where service might be had upon him, and that the statute ceased to run in his favor. *Miller v. Tyler*, 61 Mo. 401. In a recent case in Massachusetts it is held, that a person who has a domicile in another State, and only comes into the former State occasionally, or even for a few hours daily, is "absent from and resides out of the State" within the meaning of the Massachusetts and New York statutes, and the statute of limitations does not run in his favor. *Rockwood v. Whiting*, 118 Mass. 337.

A State statute of limitations, which provides in effect that, when the defendant is out of the State, the statute shall not run against the plaintiff if the latter resides in the State, but shall, if he resides out of the State, is not unconstitutional as infringing the provision that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." *Chemung Canal Bank v. Lowery*, 93 U. S. (3 Otto) 72.

To entitle the defendant to set up the six years' bar of the statute of limitations, he must have resided within the State six full years or three hundred and sixty-five days, or, in leap year, three hundred and sixty-six days. The computation cannot be made by reckoning only the secular days, Sundays are included. *Bell v. Lamprey*, 57 N. H. 168. And see *Bennett v. Cook*, 43 N. Y. (4 Hand) 537; S. C., 3 Am. Rep. 727.

§ 3. **Exceptions and limitations.** Residing beyond the limits of the State is not being "beyond the seas," and does not prevent the running of the statute in North Carolina. *State v. Harris*, 71 No. Car. 174. So, in Missouri. *State v. Willi*, 46 Mo. 236. Generally, if the debtor is within the State when the cause of action accrues, the statute commences running and is not stopped by the debtor's leaving the State afterward. *Gustin v. Brattle*, Kirby (Conn.), 299; *Coventry v. Atherton*, 9 Ohio, 34; *Halsey v. Beach*, 2 N. J. Law, 90. It has been held that a defendant who removes from one country to another is not thereby prevented from pleading the act of limitations, unless the plaintiff has been, by such removal, actually defeated or obstructed

in bringing or maintaining his action. *Wilson v. Koontz*, 7 Cranch, 202; *Sneed v. Hall*, 2 A. K. Marsh. (Ky.) 21. Absence from the State, to avoid the running of the statute, must be such that service of legal process cannot be made upon the party so as to obtain judgment against him personally. *Ward v. Cole*, 32 N. H. 452; *Penley v. Waterhouse*, 1 Iowa, 498. Foreign corporations are within the exception of the Nevada statute of limitations, as to persons absent from the State when a cause of action accrues against them. *Robinson v. Imperial, etc., Mining Co.*, 5 Nev. 44. So, they are within the like exception of the New York statute. *Olcott v. Tioga R. R. Co.*, 20 N. Y. (6 Smith) 210. An action brought by a foreigner within six years after coming for the first time to the United States, for a breach of promise of marriage made to her twenty years previously in her native country, is not barred by the Massachusetts statute. *Goetz v. Voelinger*, 99 Mass. 504. But in New Jersey, the court decided that this statute may be pleaded in bar of an action on a promissory note given in England, where the plaintiff and defendant both resided when the note came to maturity, notwithstanding the action may have been commenced within six years after the defendant came to that State. *Taberner v. Brentnall*, 3 Harr. (N. J.) 262.

The absence of the officers of a corporation beyond the limits of the State is not an absence of the corporation within the meaning of the statute of limitations, if it has an office within the State, and service of process can be obtained on it. *Sherman v. Buffalo, etc., R. R. Co.*, 21 Tex. 349. And it is generally held, that the time of a debtor's absence from the State, without losing his domicile, is not to be excluded in computing the period of limitation of an action against him. *Cunningham v. Patton*, 6 Penn. St. 355; *Sage v. Hawley*, 16 Conn. 106; *Garth v. Robards*, 20 Mo. 523; *Gillman v. Cutts*, 27 N. H. 348; *Hickok v. Bliss*, 34 Barb. 321; *Blodgett v. Prince*, 109 Mass. 44. Absence from and residence out of the State are necessary to raise the exception, and only the time when both concur is to be deducted from the statute period. *Hall v. Nasmith*, 28 Vt. 791. In the case of one becoming liable for a debt during his absence from the State, the statute begins to run in his favor as soon as he returns into the State openly and notoriously, so that he may be readily sued (*Fowler v. Hunt*, 10 Johns. 464; *Ingraham v. Bowie*, 33 Miss. 17; *Hysinger v. Baltzell*, 3 Gill & J. [Md.] 158); although his creditor does not know of his return, and he has no property in the State which can be attached (*Whitton v. Wass*, 109 Mass. 40); and absences from the State on military service are not to be deducted from the time of limitation if he retains his domicile in the State. *Id.* A return, even

for a temporary purpose, will do away with the exception of absence if not a secret, concealed or clandestine presence, of which the creditor can take no advantage. *Faw v. Roberdeau*, 3 Cranch, 174; *Hill v. Bellows*, 15 Vt. 727.

Absence from the State as a volunteer soldier or officer in the army of the United States constitutes absence on public business, within the meaning of a statute which provides that "the time during which the defendant is a non-resident of the State, or absent on public business, shall not be computed in any of the periods of limitation." *Gregg v. Matlock*, 31 Ind. 373. See *Graham v. Commonwealth*, 51 Penn. St. 255; *Gray v. Spanton*, 35 Iowa, 509.

In California, if, when the cause of action accrues, the person against whom the same exists, resides in the State, and afterward departs from it, his successive absences must be aggregated together and deducted from the whole time which has elapsed since the cause accrued, and the balance is the time the statute of limitations has run. *Rogers v. Hatch*, 44 Cal. 280. See, also, *Withers v. Bullock*, 53 Miss. 539.

If a state of war exists between the governments of the creditor and debtor, the right of the creditor to collect his debt is suspended during the war, and revives in full force on the restoration of peace, and the time during the existence of the war is not computed in limitation of the action. *Selden v. Preston*, 11 Bush (Ky.), 191. And the principle that State statutes of limitation did not run during the civil war, where the courts were not open to suitors (See *id.*; *Hawkins v. Savage*, 75 No. Car. 133; *Edwards v. Jarvis*, 74 *id.* 315; *Pitzer v. Burns*, 7 W. Va. 63; *Eddins v. Graddy*, 28 Ark. 500; *McMerty v. Morrison*, 62 Mo. 140; *Jones v. Nelson*, 51 Ala. 471; *Bell v. Hanks*, 55 Ga. 274; *Randolph v. Ward*, 29 Ark. 238; *Caperton v. Martin*, 4 W. Va. 138; 6 Am. Rep. 270; *Coleman v. Holmes*, 44 Ala. 124; 4 Am. Rep. 121; *Perkins v. Rogers*, 35 Ind. 124; 9 Am. Rep. 639, 676, note), applies to suits between persons in different States of the late so-called Confederate States, as much as to suits between citizens of loyal States and citizens of the Confederate States. *Ross v. Jones*, 22 Wall. 576; *Ahnert v. Zawn*, 40 Wis. 622. But the doctrine that the statute of limitations was suspended during the war, does not apply to the case of a mere personal trust which could have been executed by the trustee without the intervention of a court. *Mayo v. Cartwright*, 30 Ark. 407. And it is held that the civil war did not suspend the running of a State statute of limitations as to actions of contract between two persons who were residents of the same State. *Smith v. Charter Oak, etc., Ins. Co.*, 64 Mo. 330.

§ 4. **Death, or want of parties to sue or be sued.** The term

“cause of action,” includes not only the right proper, but the existence of a person by or against whom process can issue. When there is no person to sue, there can be no *laches*. See *Conwell v. Morris*, 5 Harr. (Del.) 299; *Richards v. Maryland Ins. Co.*, 8 Cranch, 84. It has accordingly been adjudged, that the statute of limitations does not commence to run against the representatives of a deceased creditor upon an obligation incurred, or debt becoming due after his decease, until administration is granted upon his estate, there being no cause of action until there is a party capable of suing. *Murray v. East India Co.*, 5 Barn. & Ald. 204; *Bucklin v. Ford*, 5 Barb. 393; *Baker v. Baker*, 13 B. Monr. (Ky.) 406; *Perry v. Jenkins*, 1 Myl. & Cr. 118; *Sturges v. Sherwood*, 15 Conn. 149; *Briggs v. Thomas*, 32 Vt. 176; *Polk v. Allen*, 19 Mo. 467. But see *contra*, *Tynan v. Walker*, 35 Cal. 634. But if the statute has once begun to run in the life-time of the testator or intestate, it does not cease running during the period which may elapse between his death and the granting of administration upon his estate, and there is an executor or administrator qualified to act. *Rhodes v. Smethurst*, 4 M. & W. 42; *Stewart v. Spedden*, 5 Md. 433; *McCullough v. Speed*, 3 McCord (So. Car.), 455; *Brown v. Merrick*, 16 Ark. 612; *Baker v. Brown*, 18 Ill. 91; *Byrd v. Byrd*, 28 Miss. 144; *Daniel v. Day*, 51 Ala. 431. And see *Sanford v. Sanford*, 62 N. Y. (17 Sick.) 553.

Not only must there be a person to sue as we have above seen, but a cause of action cannot accrue or exist unless there is a person *in esse* against whom an action can be brought and the right of action enforced. *Whitney v. State*, 52 Miss. 732. It is therefore held, that the statute of limitations is suspended by the death of the debtor until the appointment of an administrator. *Briggs v. Thomas*, 32 Vt. 176; *Etter v. Finn*, 12 Ark. 632; *Toby v. Allen*, 3 Kans. 399. See Vol. 3, tit. *Executors and Administrators*.

The disability of being “beyond sea,” under the statute of limitations of Ohio, is removed by death, and the statute commences running against the heirs immediately on the death of the ancestor, whether such heirs are under disability or not. *Whitney v. Webb*, 10 Ohio, 513.

§ 5. **Disability to sue or be sued.** See *ante*, p. 272, § 1. It is a general rule, that disabilities, which bring a person within the exceptions of the statute of limitations, cannot be tacked one upon another, but a party, claiming the benefit of the proviso, can only avail himself of the disability existing when the right of action first accrued. *McDonald v. Johns*, 4 Yerg. (Tenn.) 258; *McFarland v. Stone*, 17 Vt. 165; *Dease v. Jones*, 23 Miss. 133; *Scott v. Haddock*, 11 Ga. 258.

So, after the statute has once begun to run, no disability can suspend its running. *Rogers v. Hillhouse*, 3 Conn. 398; *Den v. Richards*, 15 N. J. Law, 347; *Tyson v. Britton*, 6 Tex. 222; *Hudson v. Hudson*, 6 Munf. (Va.) 352. But where a disability to sue grows out of some positive statutory provision, the time during which such temporary disability continues should be excluded from the computation of the period of limitation; and this is said to form an exception to the rule that the statute, after it commences to run continues, notwithstanding a subsequent disability. *Dowell v. Webber*, 10 Miss. (2 S. & M.) 452. Where the statute has begun to run, during the life of the deviser, no disability in the devisee will arrest it (*Bozeman v. Browning*, 31 Ark. 364), and when the statute begins to run against the ancestor, it will continue to run against the heir, notwithstanding that the heir may be under some statutory disability at the time of the descent cast. *Rogers v. Brown*, 61 Mo. 187. See, also, *Daniel v. Day*, 51 Ala. 431; *Swearingen v. Robertson*, 39 Wis. 462; *Jones v. Preston*, 3 Head (Tenn.), 161; *Harris v. McGovern*, 2 Sawyer, 515.

As a general rule, it is only where all the plaintiffs are under disabilities, that the running of the statute is prevented. *Patterson v. Hansel*, 4 Bush (Ky.), 654. See *ante*, p. 273, § 2. If one of several joint parties is capable of suing when the cause of action accrues, the statute runs against all, both at law and in equity. *Jordan v. McKenzie*, 30 Miss. 32. And see *Hardeman v. Sims*, 3 Ala. 747. But if all the persons entitled to sue, when the joint cause of action accrues, are under a disability, the statute will not begin to run till the disability is removed from all. *Masters v. Dunn*, 30 Miss. 264. And see *Perkins v. Coleman*, 51 id. 298; *Parmele v. McGinty*, 52 id. 475; *Shute v. Wade*, 5 Yerg. (Tenn.) 1. And if there are in existence several disabilities at the time the right of action accrues, the statute does not begin to run until the party has survived them all. *Jackson v. Johnson*, 5 Cow. 74; *Dugan v. Gittings*, 3 Gill (Md.), 138.

Where the statute has run against a claim to land by tenants in common, if they join in the action, the disability of one tenant will not avail his co-tenant, but both will be barred. *Walker v. Bacon*, 32 Mo. 144. It has, however, been held that a person suing in ejectment, who was under a disability, which prevented the statute from running against him, is entitled to recover his share, although there are tenants in common with him, whose right of action is barred by the statute. *Caldwell v. Black*, 5 Ired. (No. Car.) L. 463; *Doe v. Barksdale*, 2 Broek. 436. So, it is held that where the interests of two defendants are joint and inseparable, and the rights of one are saved by the statute, on account of his disability, such saving inures to the ben-

efit of the other, though laboring under no disability. *Sturges v. Longworth*, 1 Ohio St. 544.

In New Hampshire, where parties are under a disability at the time the statute of limitations begins to run, suit must be brought within five years after the disability is removed, in order to prevent the statute from being a bar. *Forest v. Jackson*, 56 N. H. 357.

§ 6. **Infancy.** It has been declared that *infants*, like other persons, would be barred by an act for limiting suits at law, if there was no saving clause in their favor. *Buckinghamshire v. Drury*, cited in *Beckford v. Wade*, 17 Ves. 87, 91; Ang. on Lim., § 194. But a provision of a statute of limitations, exempting from its operation persons "under legal disabilities," was held to include persons under the age of twenty-one years. *Hawkins v. Hawkins*, 28 Ind. 66. The statute will not be prevented from running by the disability of the heir, if the executor had a right of action. *Darnall v. Adams*, 13 B. Monr. (Ky.) 273. See, also, *Hall v. Bumstead*, 20 Pick. 2. And the minority of a claimant at the time when the claim accrued will not bring him within the exception of the statute in equity, if at that time the legal right of action upon it was vested in a trustee for his benefit, who was under no legal disability. *Coleman v. Walker*, 3 Metc. (Ky.) 65; *Wilmerding v. Russ*, 33 Conn. 67; *Crook v. Glenn*, 30 Md. 55. But see *Ladd v. Jackson*, 43 Ga. 288; *Bacon v. Gray*, 23 Miss. 140. Where a right of action accrues to several who are minors at the time, all being within the saving clause of the statute, they will so continue until all are free from disability. But if the right accrues when one of them is free from disability, all will be barred unless the action be commenced within the time fixed by statute. *Wells v. Ragland*, 1 Swan (Tenn.), 501. See, also, *Milner v. Davis*, Litt. Sel. Cas. (Ky.) 436; *Thomas v. Machin*, 4 Bibb (Ky.), 412; *Riden v. Frion*, 3 Murph. (No. Car.) 577. But see *Lahiffe v. Smart*, 1 Bailey (So. Car.), 192; *Gourdine v. Graham*, 1 Brev. (So. Car.) 329. It was held in South Carolina, that the successive minorities of co-tenants of land will protect the interests of co-tenants from the operation of the statute; and the rule applies as well to tenants in common as to joint-tenants, and whether the infant co-tenants join in the action to try title or not. *Hill v. Sanders*, 4 Rich. (So. Car.) 521. So, it was held that the purchaser of an infant's lands succeeds to all the infant's rights in relation to it; and if the infant is not barred of his claim to the land by the statute, at the time of the sale, the purchaser will not be. *Thompson v. Gaillard*, 3 Rich. (So. Car.) 418. And see *Schultz v. Lindell*, 40 Mo. 330.

As cumulative disabilities under the statute of limitations are not al-

lowed (see *ante*, § 1, p. 272), if a right to sue accrues in favor of an infant female, the statute begins to run when she comes of age, although she had previously married. *Fewell v. Collins*, 3 Brev. (So. Car.) 286; *Keeton v. Keeton*, 20 Mo. 530; *Robertson v. Wurdeman*, 2 Hill (So. Car.), 324; *M' Donald v. Johns*, 4 Yerg. (Tenn.) 258; *Watts v. Gunn*, 53 Miss. 502. And see *Stevens v. Bomar*, 9 Humph. (Tenn.) 546; *Ford v. Clements*, 13 Tex. 592. A husband and wife, while she was a minor, executed a conveyance of her real estate. She died during coverture, but nearly three years after her majority, without having affirmed the deed with the formalities required by law on the conveyance of the realty of married women; and it was held that the statute, not having commenced running during the life of the wife to disaffirm the sale, would not run against her children during their infancy. *Matherson v. Davis*, 2 Coldw. (Tenn.) 443. In South Carolina, it is held, that where lapse of time is relied upon as raising the presumption of a conveyance as against minors, claiming the land as heirs of the owner who is alleged to have made the conveyance, the period of minority must be deducted, and if twenty years do not remain, the presumption does not arise. *Massey v. Adams*, 3 So. Car. 254.

It is, however, the right and not the unauthorized possession of a minor, that is protected from the operation of the statute of limitations. *Williams v. M'Aliley*, Cheves (So. Car.), 200. And the statute runs against an infant having only the *color* of title to the land. *Soule v. Barlow*, 49 Vt. 329.

It is the rule in Georgia, that when the legal title to property is vested in a trustee for infants who can sue for it, and who fails to do so within time prescribed by law, so that his right of action is barred, the infant *cestui que trusts*, who have only an equitable interest in the property, will be also barred (*Brady v. Walters*, 55 Ga. 25. See, also, *Crook v. Glenn*, 30 Md. 55); but when the legal title is vested in the infants, or cast upon them by operation of law, then the statute does not run against them during their infancy. *Wingfield v. Virgin*, 51 Ga. 139.

§ 7. **Coverture.** The statute of limitations does not begin to run against a married woman while she is *covert*. *McLane v. Moore*, 6 Jones' (No. Car.) L. 520; *Michan v. Wyatt*, 21 Ala. 813; *Fatheree v. Fletcher*, 31 Miss. 265; *Fearn v. Shirley*, *id.* 301; *Wilson v. Wilson*, 36 Cal. 447. Thus, a purchaser from the husband alone of the wife's inheritance will not be protected by the statute as against the wife, until the statutory period has run out after the husband's death. *Jones v. Reeves*, 6 Rich. (So. Car.) L. 132; *McDonald v. McGuire*, 8 Tex. 361.

So, where the husband conveys without his wife, the statute does not begin to run against her till the death of her husband. *Culler v. Motzer*, 13 Serg. & R. (Penn.) 356. So, where money is lent by a *feme covert*, having a separate estate, to her husband, the statute does not begin to run against the debt until the death of the husband, for, on account of the unity of husband and wife, the latter cannot sue the former (*Towers v. Hugner*, 3 Whart. [Penn.] 48; Ang. on Lim., § 60); but it is otherwise by statute in California. *Wilson v. Wilson*, 36 Cal. 447; *Cameron v. Smith*, 50 id. 303. Title by adverse possession cannot be acquired against a married woman during her coverture. *Gage v. Smith*, 27 Conn. 70. But it is held that where an adverse possession has commenced in the life-time of the ancestor, the operation of the statute is not prevented by the title descending to a *feme covert*. *Jackson v. Robins*, 15 Johns. 169. As we have seen in the preceding section, the disability of coverture cannot be united with that of infancy, in order to avoid the effect of the statute. See, also, *Martin v. Letty*, 18 B. Monr. (Ky.) 573; *Billon v. Larimore*, 37 Mo. 375. And, therefore, a female infant, who marries before she becomes of age, but after the right of action accrues, is not protected by her coverture from the running of the statute after she becomes of age. *Dugan v. Gittings*, 3 Gill (Md.), 138. And in general, where the statute has once commenced to run against a *feme sole* her subsequent marriage cannot suspend it. *Killian v. Watt*, 3 Murph. (No. Car.) 167; *Wellborn v. Weaver*, 17 Ga. 267. But if a *cestui que trust* is a *feme sole*, and marries after settlement with her trustee, and before fraud in such settlement is discovered, the statute does not run against her during her coverture. *Wellborn v. Rogers*, 24 id. 558. See *ante*, p. 269, Art. 1, § 22.

The tendency of modern legislation as well as of the decisions of the courts throughout the country is to recognize the separate rights of married women with regard to their property, and their power to control the same, and the courts lean toward an enlargement of their responsibility and duty with regard to their property, and a curtailment of those exemptions and privileges that were given to married women as an offset for their want of power. Thus it has been held, that a married woman, who executes a mortgage of her land with her husband, is not saved by her coverture from the running of the statute against her title in favor of the mortgagee. *Hanford v. Fitch*, 41 Conn. 487. Where the husband is the only person who can legally bring suit for land, the title which was derived through the wife, the statute runs during the coverture. *Shipp v. Wingfield*, 46 Ga. 593. In California, the general statute of limitations applies to a cause of action concern-

ing the wife's separate estate where she may sue alone. *Cameron v. Smith*, 50 Cal. 303. See, also, *Brown v. Cousens*, 51 Me. 301; *Price v. Slaughter*, 1 Cinc. (Ohio) 429. So, it is held by the supreme court of the United States, that the Illinois statute for the protection of married women in their separate property, repeals by implication so much of the saving clause of the statute of limitations as relates to married women. *Kibbe v. Ditto*, 93 U. S. (3 Otto) 674. See *Beach v. Miller*, 51 Ill. 206; S. C., 2 Am. Rep. 290; *Noble v. McFarland*, 51 Ill. 226. But the provision of the North Carolina Code, allowing a *feme covert* to sue or be sued concerning her separate property, does not remove the disability of coverture so as to allow the statute of limitations to bar a *feme covert's* right of action. *State v. Troutman*, 72 No. Car. 551. The right of suing alone is a privilege which may be used for the advantage of a *feme covert*, but a failure to exercise this privilege cannot operate to her prejudice. *Id.*

On the marriage of a female under twenty-one years of age, according to the laws of Texas she becomes of full age, and the statute then begins to run against her. *Thompson v. Cragg*, 24 Tex. 582.

A *feme covert* party with others to a decree in chancery may file a bill to review it at any time during coverture, and if she joins with others, who are barred by lapse of time, the bill may be dismissed as to them, and retained as to her, if it appear from the record that she would be entitled to such review upon her separate bill. *Trimble v. Longworth*, 13 Ohio St. 431.

The phrase, "under legal disabilities," in the Indiana statute, is so construed as to include married women. *Bauman v. Grubbs*, 26 Ind. 419. As against the heir of a married woman whose husband survives her, and is entitled to an estate in her lands as tenant by the courtesy, the statute of limitations runs from the expiration of his estate, and not from her death. *Dyer v. Brannack*, 66 Mo. 392.

§ 8. **Insanity.** If a person, entitled to bring an action, shall be, at the time the cause of action accrued, *non compos mentis*, the statute of limitations does not run against such person. *Little v. Downing*, 37 N. H. 355. And deaf and dumb persons, shown to have been so from birth, are *prima facie* incompetent to sue and to contract, and the statutes of limitations do not run against them, unless they are shown to have sufficient intelligence to know and comprehend their legal rights and liabilities. *Oliver v. Berry*, 53 Me. 206. Where a deed was obtained by one standing in a confidential relation toward another of weak intellect, and the relation and the imbecility continued from the time of the act till the bringing of a suit, to be relieved against the deed, it was held that the statute did not avail the defendant in North

Carolina. *Oldham v. Oldham*, 5 Jones' (No. Car.) Eq. 89. The Texas statute of limitations declaring that all actions for injuries to the person of another shall be brought "within one year next after the cause of such action and not after," has no application to the case of a person who has been rendered insane, by reason of the injuries, when the insanity prevented him from instituting the action. *Sasser v. Davis*, 27 Tex. 656.

The statute begins, however, to run against a *non compos* at the time of the recovery from lunacy, and continues to run till it has run out, notwithstanding that the lunacy returns. *Clark v. Trail*, 1 Mete. (Ky.) 35. And it was held that the statute was not checked, in its operation on a note, because, some time after it became due, the payee became *non compos mentis*. *Adamson v. Smith*, 2 Mill's (So. Car.) Const. 269. And where an owner of land has been disseized, his subsequent insanity does not prevent the disseizor's title from maturing, by twenty years' adverse possession. *Allis v. Moore*, 2 Allen, 306.

Legal liabilities may be enforced against lunatics and idiots, whether the mental incompetency has been judicially determined or not. The idiocy, therefore, of the debtor does not take a claim out of the operation of the statute of limitations during his life-time, but the statute begins to run against the claim the same as if he were of sound mind. *Sanford v. Sanford*, 62 N. Y. (17 Sick.) 553.

§ 9. **Suspension by prior suit.** To prevent the statute of limitations from running, a suit must be brought and prosecuted in good faith. If the time constituting the bar is permitted to elapse between the time of suing out one process until another, the mere bringing of the suit will not prevent the statute from running, and is no legal reason why the bar should be disallowed. *Clark v. Kellar*, 3 Bush (Ky.), 223. But see *contra*, *King v. State Bank*, 13 Ark. 269. So, a properly instituted claim, voluntarily abandoned, cannot be made available in a subsequent action to save it from the operation of the statute. *Ex parte Hanks*, 1 Cheves' (So. Car.) Eq. 203; *Shields v. Boone*, 22 Tex. 193; *Null v. White Water Valley Canal Co.*, 4 Ind. 431; *Ivins v. Schooley*, 18 N. J. Law, 269. But a mistake as to the form of remedy is not "negligence in the prosecution" of the suit, within the intent of the statute. *Flournoy v. Jeffersonville*, 17 Ind. 169. If an action be brought within six years, and after that time the plaintiff be nonsuited, it is a good bar to a second action for the same cause. *Harris v. Dennis*, 1 Serg. & R. 236; *Cheeny v. Archer*, Riley (So. Car.), 195. The plaintiff brought suit before his demand was barred, and served the defendant with defective process, and took a judgment by default. The defendant, after the statute period for the recovery of such claims

had elapsed, procured the court to set aside the judgment, and it was held that the plaintiff was not entitled to the benefit of the statute. *Isaacs v. Price*, 2 Dill. (C. C.) 347. See, also, *Williamson v. Wardlaw*, 46 Ga. 126. But where an action has been seasonably brought, after a reversal of a judgment for the same cause of action, it has been held to be within the saving of the statute. *Drane v. Hodges*, 1 Harr. & M. (Md.) 518. Delivering a claim to a justice of the peace, with directions to issue a summons, not being the commencement of a suit, does not suspend the operation of the statute. *Price v. Luter*, 14 Tex. 6. And suits for the recovery of land must be successful and lead to a change in the possession, in order to stop the operation of the statute. *Workman v. Guthrie*, 29 Penn. St. 495; *Kennedy v. Reynolds*, 27 Ala. 364; *Moore v. Greene*, 19 How. (U. S.) 69. To a plea of the statute of limitations, it is not a good replication, that a suit for the same demand was commenced in a court in another State, and discontinued within six years. *Delaplaine v. Crowninshield*, 3 Mas. (C. C.) 329. And see *Torbert v. Wilson*, 1 Stew. & P. (Ala.) 200. And it has been held that the pendency of proceedings in insolvency does not suspend the operation of the statute in favor of the debtor. *Richardson v. Thomas*, 13 Gray, 381. A suit instituted in a court without jurisdiction interrupts prescription, in Louisiana. *Sorrell v. Laurent*, 27 La. Ann. 70.

It was held in Connecticut to be no answer to a plea of the statute of limitations, that a suit for the same cause of action was brought within the limited time, and, being misconceived, was discontinued, and a new action immediately brought. *Sherman v. Barnes*, 8 Conn. 138. N. Y. Code of Civ. Pro., § 405.

Where a person stole a large sum of money, and two years after was tried for the theft and acquitted, an action of trover for the sum stolen, brought within six years after the acquittal, was held to be in time, as the statute of limitations was suspended until the termination of the prosecution. *Hutchinson v. Bank of Wheeling*, 41 Penn. St. 42.

As a general rule, the running of the statute of limitations is stopped when the defendant pleads a set-off, or brings a cross-action thereon. *Gilmore v. Reed*, 76 Penn. St. 462. See *ante*, p. 271, Art. 1, § 23.

An action abated by the death of one of the parties, if recommenced within a *reasonable time*, is not affected by the statute of limitations. *Martin v. Archer*, 3 Hill (So. Car.), 211; *Richards v. Maryland Ins. Co.*, 8 Cranch, 84. See *ante*, p. 237, Art. 1, § 10. If another action is commenced *within a year* after the abatement of the first suit, though it may be that the statute has then elapsed, it will have been brought within the equity of the proviso allowing a year within which

to bring actions in certain cases. *Baker v. Baker*, 13 B. Monr. (Ky.) 406.

§ 10. **Restraint by injunction.** It is said that it would be unconscientious for a party to plead the statute of limitations against an adversary who, at his solicitation, had been enjoined from prosecuting his suit. One who, under pretense of rights adjudged unfounded, unlawfully uses legal process to restrain another in prosecuting a right, cannot avail himself of the delay his own wrong has occasioned to defeat that right. *Fortier v. Zimpel*, 6 La. Ann. 54. It has accordingly been held that the statute does not run during the time that a plaintiff was enjoined, at the suit of the defendant, from prosecuting his suit at law. *Doughty v. Doughty*, 10 N. J. Eq. 347. See, also, *Little v. Price*, 1 Md. Ch. 182; *Moore v. Crockett*, 10 Humph. (Tenn.) 365; *Hutsonpiller v. Stover*, 12 Gratt. (Va.) 579; *Wilkinson v. Flowers*, 37 Miss. 579. And it is held in Pennsylvania that where a right to sue in trespass is suspended by the entry of a *caveat*, the statute will not run against the owner of the land nor operate against a recovery for such injuries, notwithstanding the trespass complained of was done more than six years before the commencement of the action. *King v. Baker*, 29 Penn. St. 200.

But it was held, in New York, that prior to the Revised Statutes of that State an injunction out of chancery would not suspend the running of the statute of limitations, and that the remedy of the party stayed was by application to chancery, to restrain the defendant from pleading the statute. *Barker v. Millard*, 16 Wend. 572. But under the Revised Statutes the running of the act of limitations is suspended by an injunction. 2 R. S. (Edm. ed.) 310, § 105. And see *Sands v. Campbell*, 31 N. Y. (4 Tiff.) 345; N. Y. C. C. P., § 406.

An injunction suspending the sale of property claimed as homestead, or as separate property of the wife, under a trust deed, to secure promissory notes, will have the effect of suspending the statute of limitation as to the notes. *Williams v. Pouns*, 48 Tex. 141.

The restraining of the execution of a judgment by a writ of injunction, sued out by the judgment debtor, does not interrupt the current of prescription in Louisiana. *Yale v. Randel*, 23 La. Ann. 579; N. Y. Code of Civ. Pro., § 406.

§ 11. **Agreements to waive the statute.** A defendant will not be permitted to plead the statute of limitations, when it appears that the plaintiff delayed bringing his action, under an agreement with the defendant that such action should abide the decision of another already instituted and involving the same merits. *Daniel v. Board of Commissioners*, 74 No. Car. 494. So, a mutual understanding and agree-

ment, between the debtor and creditor, that suit shall not be brought upon an account until the debtor shall have gone to Europe and returned, is a good bar to the act of limitations, during his absence from this country. *Holladay v. Littlepage*, 2 Munf. (Va.) 316. And it seems there may be an agreement, that, in the consideration of an inquiry into the merits of a disputed claim, no advantage should be taken of the statute, in respect of the time employed in the inquiry, and an action might be brought for a breach of such agreement. *East India Co. v. Paul*, 7 Moore's P. C. C., 85.

But a statute, limiting the time for bringing an action, is not defeated or its operation retarded, by negotiations for a settlement, or for a reference pending between the parties, provided there be no agreement for delay and the defendant has done nothing to mislead the plaintiff. *Gooden v. Ins. Co.*, 20 N. H. 73. And see *Ormsby v. Letcher*, 3 Bibb (Ky.), 269.

In an action on a promissory note the defendant filed an account in set-off, against which the plaintiff set up the statute of limitations. It was in proof, that the articles charged in the account were, by agreement, to be credited on the note, and it was held that the set-off was not barred by the statute, being saved by the agreement. *Baird v. Ratcliff*, 10 Tex. 81.

A direction in a will by a testator to pay debts does not revive debts barred by the statute of limitations. *Rush v. Falas*, 1 Phil. (Penn.) 463; *Braxton v. Wood*, 4 Gratt. (Va.) 25; *Tazewell v. Whittle*, 13 id. 329; *Walker v. Campbell*, 1 Hawks (No. Car.), 304; *Campbell v. Sullivan*, Hard. (Ky.) 17, 20.

ARTICLE III.

OF NEW PROMISES OR ACKNOWLEDGMENTS.

Section 1. Definition and nature. It is now a well-settled doctrine that if a person makes a promise that he will pay a debt he justly owes, for the recovery of which all legal and equitable remedies are barred by the statute of limitations, such promise renders him liable to an action, the promise being founded upon the same legal consideration of an obligation existing *in foro conscientie*. See Ang. on Lim., § 208; 1 Sm. Lead. Cas. (7th Am. ed.) 942, 952. The doctrine proceeds, upon the ground, not of a strict *legal* right in the creditor, which he may enforce against the will of the debtor, but upon the notion that there still exists, notwithstanding the statutable prescription, a moral obligation binding *in foro conscientie*, which, if recognized by the debtor, repels any imputation that the transaction is *nude*

pactum, without any consideration. STORY, J., in *Le Roy v. Crowninshield*, 2 Mas. (C. C.) 151. And see *Magee v. Magee*, 10 Watts (Penn.), 172; *Danforth v. Culver*, 11 Johns. 146; *Bailey v. Crane*, 21 Pick. 323; *Belknap v. Gleason*, 11 Conn. 160; *Stevens v. Hewitt*, 30 Vt. 262; *Dawson v. King*, 20 Md. 442.

That a debt barred by the statute of limitations may be revived by a new promise, is fully established by the decisions of the courts, both of England and this country. So, it is well settled that such promise may be express or implied. *Phelps v. Williamson*, 26 Vt. 230; *Ross v. Ross*, 20 Ala. 105; *Johnson v. Evans*, 8 Gill (Md.), 155; *Waller v. Lacy*, 1 Man. & Gr. 54; *Gardner v. McMahon*, 3 Q. B. 561. If it be an express promise, it must be clear and explicit, direct and positive. *Head v. Manners*, 5 J. J. Marsh. (Ky.) 255; *Yaw v. Kerr*, 47 Penn. St. 333; *Strickland v. Walker*, 37 Ala. 385; *Ringo v. Brooks*, 26 Ark. 540. And if a new promise is to be raised by implication of law from an acknowledgment, there must be an unqualified acknowledgment of a subsisting debt which the defendant is liable and willing to pay. *Stockett v. Sasceer*, 8 Md. 374; *Wakeman v. Sherman*, 9 N. Y. (5 Seld.) 88; *Wachter v. Albee*, 80 Ill. 47; *Miller v. Baschore*, 83 Penn. St. 356; 24 Am. Rep. 187; *Senseman v. Hershman*, 82 id. 83; *Otterback v. Brown*, 2 MacArthur, 541; *Simon-ton v. Clark*, 65 No. Car. 525; 6 Am. Rep. 752. If the acknowledgment is accompanied with any qualification tending to rebut the implication of a promise of payment, which would otherwise arise, there can be no recovery. *Hart v. Prendergast*, 14 Mees. & W. 741; *Routledge v. Ramsay*, 8 Ad. & El. 221; *Rackham v. Marriott*, 1 Hurl. & N. 234; 2 id. 195; *Carroll v. Forsyth*, 69 Ill. 127; *Brown v. Joyner*, 1 Rich. (So. Car.) 210; *Smith v. Fly*, 24 Tex. 345; *Harbold v. Kuntz*, 16 Penn. St. 210; *Weaver v. Weaver*, 54 id. 152; *Butler v. Winters*, 2 Swan (Tenn.), 91. But, in general, any language of the debtor to the creditor clearly admitting the debt to be due and unpaid, and showing an intention to pay it, will be considered an implied promise to pay, and will take the case out of the statute. *Wooters v. King*, 54 Ill. 343. And a jury will be authorized and bound to infer such promise, from a clear unconditional and unqualified admission of the existence of the debt, at the time of such admission, if unaccompanied with any refusal to pay, or declaration indicative of any intention to insist on the statute of limitations as a bar. *Sigourney v. Drury*, 14 Pick. 390. And see *Black v. Reybold*, 3 Harr. (Del.) 528; *Lee v. Polk*, 4 McCord (So. Car.), 215; *Knight v. House*, 29 Md. 194; *Bulloch v. Smith*, 15 Ga. 395.

After the prescription of a debt in Louisiana the debtor, by volun-

tarily acknowledging the debt and promising to pay it, with a full knowledge that it is prescribed, thereby bars himself of the plea of prescription. *Gauche v. Gondran*, 20 La. Ann. 156.

§ 2. **What is sufficient.** An admission of indebtedness, and an expression of willingness to pay it, need not be of a specific sum, to take the case out of the statute of limitations. It is sufficient that an indebtedness in respect to a particular matter be acknowledged, and a willingness to pay the amount be expressed, leaving the amount of the debt to be ascertained afterward. *Thompson v. French*, 10 Yerg. (Tenn.) 453; *Davis v. Steiner*, 14 Penn. St. 275. But the sum must be capable of being reduced to a certainty. *Mc Rae v. Leary*, 1 Jones' (No. Car.) L. 91; *Moore v. Hyman*, 13 Ired. (No. Car.) L. 272. Among acknowledgments which have been held sufficient to take a case out of the statute, are the following: An acknowledgment that the debt is just and unpaid (*Beasley v. Evans*, 35 Miss. 192; *Webber v. Cochran*, 4 Tex. 31); an assertion by the debtor, that the debt was one which he should have to pay, and intended to pay (*Hall v. Creswell*, 12 Gill & J. [Md.] 36); an admission by the maker of a note, outlawed by the statute, "that it was his note, for money he had borrowed from his father; that he had not paid it, and didn't think he would, since his father had not left him so much as he ought" (*Felty v. Young*, 18 Md. 163); an admission generally, that the debt is then due, or that a liability then exists (*Ross v. Ross*, 20 Ala. 105. But see *post*, p. 292, § 3); a general acknowledgment of a subsisting indebtedness, without specifying the amount of the debt, or the balance due (*Lord v. Harvey*, 3 Conn. 370); an acknowledgment of a debt, though accompanied by an allegation that it is barred by the statute (*Cadmus v. Dumon*, 1 N. J. Law, 176); the defendant's confession of his signature to a note, though at the same time he refused to pay it (*Cobham v. Mosley*, 2 Hayw. [No. Car.] 6); an acknowledgment of a debt, by giving a mortgage to secure it (*Grayson v. Taylor*, 14 Tex. 672); an acknowledgment of indebtedness in an answer in equity (*Brigham v. Hutchins*, 27 Vt. 569); a bare acknowledgment of a debt remaining unsatisfied, without any evidence of a promise to pay it (*Rodrigue v. Fronty*, 2 Brev. [So. Car.] 31); acknowledgment of a debt by a married woman in the presence of her husband, and tacitly assented to by him (*Orcutt v. Berrett*, 12 La. Ann. 178); an assertion by the debtor "that the debt is a just and honorable debt" and "that he did not consider it outlawed" (*Estate of Wetham*, 6 Phil. [Penn.] 161); an acknowledgment by the defendant that the plaintiff had done work for him, but that he had an account in bar, and, when a certain person should come to town, he would have the business settled (*Poe v. Conway*, 2 Harr. & J. [Md.] 307);

an inventory and affidavit of a debt, made by an insolvent in his proceedings to obtain a discharge under the insolvent act (*Bryar v. Willcocks*, 3 Cow. 159. But see *Georgia Ins. Co. v. Ellicott*, Taney, 130); so, a party's acknowledgment of errors in a settlement, and his promise to pay the amount of such errors, with interest, proved by a single witness, and not distinctly denied by the answer to the plaintiff's bill, was held to take his case out of the statute. *Farnam v. Brooks*, 9 Pick. 212. So, the giving of a note to secure the payment of interest accrued on a note previously given, is a sufficient acknowledgment of the existence of a debt to take the case out of the operation of the statute. *Sigourney v. Wetherell*, 6 Mete. (Mass.) 553; *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267. And so of charges made annually by a treasurer against himself, in the books of the corporation, for an annual interest on a debt due from him. *Bluehill Academy v. Ellis*, 32 Me. 260. And where a debtor said to his creditor, "If you will call in two weeks I will pay you something on the debt, I cannot tell how much," — it was held to be an unqualified recognition of his liability to pay the whole debt, and such an acknowledgment as removed the bar of the statute. *Blakeman v. Fonda*, 41 Conn. 561. So, it is held that a pledge of stock to secure a debt operates as an implied and continuing acknowledgment of the indebtedness, and prevents the running of the statute. *Citizens' Bank v. Johnson*, 21 La. Ann. 128.

Among instances of promises which have been held sufficient to take the case out of the statute are the following: A promise not to plead the statute (*Stearns v. Stearns*, 32 Vt. 678. See *ante*, p. 286, Art. 2, § 11); a promise to pay as soon as the debtor can (*Cummings v. Gassett*, 19 Vt. 308); where the defendant, on being arrested by the sheriff, promised to settle with the plaintiff if he would give him time for payment (*Sluby v. Champlin*, 4 Johns. 461); the words "I am sure I don't owe, but if I do, am willing to pay" (*Steele v. Towne*, 28 Vt. 771); a promise by a debtor to settle with his creditor and ascertain if he is "in due" to such creditor (*McLin v. McNamara*, 2 Dev. & Bat. [No. Car.] Eq. 82); a promise by a married woman to pay money borrowed by her as agent for her husband (*Burk v. Howard*, 13 Mo. 241); and a promise within six years, by the guardian of a spendthrift, to pay a debt due from the ward. *Manson v. Felton*, 13 Pick. 206. Where a debtor promises that, if allowed a little time, he will pay all his debts, and the creditor forbears to sue for two years, that is sufficient performance. *Guy v. Tams*, 6 Gill (Md.), 82. So, a promise to the party, or his agent, to pay the debt, where the statute has run, or the debt is barred by a discharge in bankruptcy with an intent to confirm the original demand, is always sufficient to avoid the statute of

limitations, or a discharge in bankruptcy. *Hill v. Kendall*, 25 Vt. 528. An unqualified promise to settle book accounts, barred by the statute, is a direct admission of unsettled accounts existing between the parties at the time of such admission, and such promise to settle accounts when unaccompanied by any unwillingness to pay the balance, if any, implies a promise to pay whatever balance should, upon such settlement, be found due (*Hunter v. Kittredge*, 41 id. 359. See, also, *Bliss v. Allard*, 49 id. 350); and in a receipt in full "one item only excepted (naming it) which may be adjusted as the facts may prove," takes such item out of the statute. *Sweet v. Hubbard*, 36 id. 294. So, a promise by the maker of a note, barred by the statute, to "settle the note," is equivalent to a promise to pay. *Pinkerton v. Bailey*, 8 Wend. 600. But see *post*, p. 292, § 3. And where the maker of a promissory note, upon its presentation to him, declared that he had paid part and had certain demands against the holder, but that something was due which he was ready to pay, without specifying any sum, this was held to be sufficient to take the case out of the statute. *Eastman v. Walker*, 6 N. H. 367. So, on a demand of a debt, the defendant said that he had received the money, but that the plaintiff had received and retained money belonging to him, and this was held to be a sufficient acknowledgment. *White v. Potter*, 1 N. J. Law, 159. So, after a debt due from A to B was barred by the statute, A wrote as follows: "I am willing to pay you the principal of what I owe you, without interest,"—and it was held, that this was such an acknowledgment as to enable B to maintain an action for the principal. *McDonald v. Grey*, 29 Tex. 80. But see *Duffie v. Phillips*, 31 Ala. 571. Where it appeared that the maker of a note "promised to renew the note and appointed a time to do it," this was held to be equivalent to an express promise to pay it. *Peavey v. Brown*, 22 Me. 100. So, where the maker of a note denied his signature, declaring the note to be a forgery, but said that if it could be proved that he signed the note, he would pay it, and it was so proved at the trial, this was held to be sufficient to take the case out of the statute. *Seaward v. Lord*, 1 id. 163. And where the maker of a note expressed her regret at being unable, in consequence of pecuniary embarrassments, to remit the amount due, and referred the holder to her agent "who had the entire management of her affairs and would do all that the ruined condition of her fortune would permit," it was held that this was a sufficient acknowledgment of a present subsisting debt to remove the bar of the statute. *Buffington v. Davis*, 33 Md. 511.

It has been held that an acknowledgment or new promise made on Sunday, is admissible in evidence to remove the bar of the statute of

limitations. *Lea v. Hopkins*, 7 Penn. St. 492; *Thomas v. Hunter*, 29 Md. 406; *Ayres v. Bane*, 39 Iowa, 518. But see *contra*: *Bumgardner v. Taylor*, 28 Ala. 687; *Haydock v. Tracy*, 3 Watts & S. 507. See *ante*, p. 119.

§ 3. **What is not sufficient.** A mere offer, unaccepted by the creditor, to compromise an indebtedness by paying a part thereof in consideration of a release of the whole, will not remove the bar of the statute. *Slack v. Norwich*, 32 Vt. 818; *Pool v. Relfe*, 23 Ala. 701; *Glensey v. Fleming*, 4 Dev. & Bat. (No. Car.) L. 129; *Currier v. Lockwood*, 40 Conn. 349; S. C., 16 Am. Rep. 40; *Chambers v. Rubey*, 47 Mo. 99; 4 Am. Rep. 318; *Bowker v. Harris*, 30 Vt. 424. So, an offer to pay a promissory note in a worthless currency, such as Confederate notes, unaccepted by the holder, will not interrupt prescription (*McCranie v. Murrell*, 22 La. Ann. 477), or revive a debt barred by the statute. *Simonton v. Clark*, 65 No. Car. 525; S. C., 6 Am. Rep. 752. A promise to remove the bar of the statute must be a promise to pay a debt. A promise to *settle* with the claimant is not sufficient. *Bell v. Crawford*, 8 Gratt. (Va.) 110. The words "I agree to settle this bill" import only an agreement to examine the demand and adjust it, and are not enough. *McClelland v. West*, 59 Penn. St. 487. So, an agreement by the defendant, to settle by the books of the plaintiff, is not a sufficient acknowledgment to save the statute, although they show a balance against the defendant (*Russell v. Gass*, Mart. & Y. [Tenn.] 270); nor a promise to settle by the books of the plaintiff, if he would settle by those of the defendant. *Id.* And it is held, that a debtor who allows an account against him to become stated, by omitting to dispute it when presented, does not thereby waive the defense of the statute. *Bucklin v. Chapin*, 1 Lans. (N. Y.) 443.

If the right of action for torts be once barred, no subsequent acknowledgment will take it out of the express language of the statutes of limitations. In *assumpsit*, it has the effect, only because it amounts to a new promise. *Galligher v. Hollingsworth*, 3 Har. & M. (Md.) 122; *Goodwyn v. Goodwyn*, 16 Ga. 114; *Ott v. Whitworth*, 8 Humph. (Tenn.) 494. See *ante*, pp 262-265.

An admission of an existing debt, or a promise to pay it, will have no effect against the statute, after the expiration of the period of limitation from the time of the admission, or new promise, was made. *Munson v. Rice*, 18 Vt. 53.

Among acknowledgments and promises which have been adjudged insufficient to take the case out of the statute are the following: A mere general admission by the party sought to be charged, that he was owing something to the plaintiff, without stating how much, or what for (*Pray*

v. Garcelon, 17 Me. 145; *Shitler v. Bremer*, 23 Penn. St. 413; *Bell v. Morrison*, 1 Pet. 351; *McBride v. Gray*, Busb. [No. Car.] L. 420; *Hughes v. Hughes*, Cheves [So. Car.], 33; a mere admission that the debt is due and unpaid, when the admission is accompanied by expressions which repel the idea of willingness to pay the debt (*Gray v. McDowell*, 6 Bush [Ky.], 475. And see *Lee v. Wyse*, 35 Conn. 384; *Tillet v. Linsey*, 6 J. J. Marsh. [Ky.] 337; *Lombard v. Pease*, 14 Me. 349); an admission that a party owes a debt, with an assertion that he is unable to pay it (*Manning v. Wheeler*, 13 N. H. 486. See, also, *Thayer v. Mills*, 14 Me. 300); an acknowledgment of the original cause of action, accompanied by a refusal to pay unless compelled by law (*Jenkins v. Boyle*, 2 Cranch [C. C.], 120); an acknowledgment by the defendant "that he had once owed the plaintiff, but he supposed his brother had paid it, and if his brother had not paid it, he owed it yet" (*Bell v. Rowland*, Hard. [Ky.] 309); an acknowledgment that a debt has never been paid (*M'Lean v. Thorp*, 4 Mo. 256); an acknowledgment accompanied with circumstances or declarations showing an intention to insist on the benefit of the statute (*Bangs v. Hall*, 2 Pick. 368); a parol acknowledgment of adverse title, made by a tenant with a view to compromise (*Sailor v. Hertzog*, 4 Whart. [Penn.] 259); an acknowledgment, "I owe A a considerable sum, \$1,000 or \$1,200, and I reckon more; and I want it paid" (*Faison v. Bowden*, 76 No. Car. 425); the words, "The debt is an honest one, but I have paid it" (*Tichenor v. Colfax*, 4 N. J. Law, 153); writing, "I request no suit shall be brought on this note, and agree that the statute shall not run against it. I will pay it soon" (*Woodfin v. Anderson*, 2 Tenn. Ch. 331); where the defendant said that the plaintiff "might have been paid long ago, if he had not treated me badly" (*Goldsby v. Gentle*, 5 Blackf. [Ind.] 436); a confession of judgment before the clerk in vacation, not signed by the defendant (*Mifflin v. Stalker*, 4 Kans. 283); the entry of a check on the books of the drawer as unpaid (*Harman v. Claiborne*, 1 La. Ann. 342); an acknowledgment in the defendant's plea that the signature to the note sued on is his, accompanied with a protestation that the debt has long since been discharged (*Dickinson v. McCamy*, 5 Ga. 486); a declaration of the defendant that she "remembered giving the note, but believed she had paid it" (*Holly v. Freeman*, 2 Ired. [No. Car.] L. 218; the expression, "I feel ashamed of it standing so long" (*Wilcox v. Williams*, 5 Nev. 206); a promise to pay when able (*Love v. Hugh*, 2 Phil. [Penn.] 350); a promise to pay all one owes, accompanied by a denial that he owes any thing, or is legally liable to pay any thing (*Porter v. McClure*, 15 Wend. 187); a promise to pay such sum as the plaintiff might deem just, when he

should bring forward his account (*Long v. Jameson*, 1 Jones' [No. Car.] Law, 476); a promise to pay all the notes that can be produced against the alleged promisor, accompanied by an averment that he owes none and that none can be produced (*Norton v. Colby*, 52 Ill. 198); or a promise by a debtor, on presentment of a bill for payment to "attend to it." *Marqueze v. Bloom*, 22 La. Ann. 328; *Emerson v. Miller*, 27 Penn. St. 278. And it has been repeatedly held that the insertion of a debt in the schedule of creditors, filed and sworn to by the debtor under proceedings in insolvency, is insufficient to take the case out of the statute. *Hidden v. Cozzens*, 2 R. I. 401; *Roscoe v. Hale*, 7 Gray, 274; *Richardson v. Thomas*, 13 id. 381; *Christy v. Flemington*, 10 Penn. St. 129; *Georgia Ins. Co. v. Ellicott*, Taney, 130. But see *Bryan v. Willcocks*, 3 Cow. 159. A subsequent promise made after the commencement of a suit, or by admission in the pleadings, will not in general revive a right of action barred by the statute. *Bradford v. Spyker*, 32 Ala. 134; *Bateman v. Pinder*, 3 Q. B. 574. But see *Danforth v. Culver*, 11 Johns. 146. And where a part of an account is barred by the statute, an admission of indebtedness and a general promise to settle and pay, is not such a new promise as will take the case out of the statute, for it may refer to that part unaffected by the statute. *Morgan v. Walton*, 4 Penn. St. 321. A defendant, being requested to pay a note, as he had agreed to do, answered that folks did not always do as they agreed, and it was held that this was not evidence of a new promise, sufficient to take the note out of the operation of the statute. *Douglas v. Elkins*, 28 N. H. 26. So, a letter from a debtor asserting that there was once a debt, but it had been paid, and stating how, will not take the case out of the statute, although it is proved that the writer is mistaken as to the payment. *Bailey v. Bailey*, 14 Serg. & R. (Penn.) 195.

In order to revive a debt barred by the statute of limitations in Wisconsin, there must not only be an acknowledgment of it, but also an unqualified promise to pay it; and this rule applies to debts owing by the State, as well as by private individuals. *Carpenter v. State*, 41 Wis. 36.

§ 4. **Conditional promise.** The acknowledgment of a debt, if accompanied with a promise to pay *conditionally*, is unavailing to take a demand out of the operation of the statute, unless the condition to which the promise is subjected by the defendant is complied with, or the event has happened upon which the promise depends. *Deshon v. Eaton*, 4 Me. 413; *Bell v. Morrison*, 1 Pet. 351; *Farmers' Bank v. Clarke*, 4 Leigh (Va.), 603; *Shaw v. Newell*, 1 R. I. 488; *Mitchell v. Clay*, 8 Tex. 443; Ang. on Lim., § 235. A written promise to pay a debt which is barred by the statute "as soon as I can," will not sustain an

action thereon without proof of the promisor's ability to pay. *Tanner v. Smart*, 9 Dowl. & Ry. 549; S. C., 6 Barn. & C. 603; *Hammond v. Smith*, 33 Beav. 452; *Bidwell v. Rogers*, 10 Allen, 438; *Wakeman v. Sherman*, 9 N. Y. (5 Seld.) 88; *Laforge v. Jayne*, 9 Penn. St. 410. But see *Cummings v. Gassett*, 19 Vt. 308. So, a promise by a defendant, that he will settle with the plaintiff as soon as he receives his pay for certain work, is a conditional promise, and does not waive the statute of limitations, unless it is proved that he has received his pay. *Mullett v. Shrump*, 27 Ill. 107. So, "If you will buy C.'s land, I will pay him the amount I owe you," was held to be a conditional acknowledgment, valid only in case of the purchase of the land. *Luna v. Edmiston*, 5 Sneed (Tenn.); 159. So, if the defendant promise to pay a debt, barred by the statute, in certain specific articles, the promise is conditional, and the plaintiff is bound to show a willingness to accept such articles (*Bush v. Barnard*, 8 Johns. 407); for, it is a general rule, that a conditional promise to pay a specified demand, where the other party refuses to accede to the condition annexed, is not sufficient to take the demand out of the operation of the statute, either as a promise to pay, or an admission of present indebtedness. *McLellan v. Allbee*, 17 Me. 184. For instances of insufficient promises and acknowledgments see *ante*, p. 292, § 3.

§ 5. **Indefinite promise.** If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, the acknowledgment must contain an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay, or if the expression be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inference, which may affect different minds in different ways, they cannot go to the jury as evidence of a new promise, to revive the cause of action. *Carroll v. Forsyth*, 69 Ill. 127. And see *ante*, §§ 1 and 3, pp. 287-294. It ought clearly to appear in all cases, that the acknowledgment relates to the identical debt which is sought to be recovered upon the strength of it. *Arey v. Stephenson*, 11 Ired. (No. Car.) 86; *Buckingham v. Smith*, 23 Conn. 453; *Johns v. Lantz*, 63 Penn. St. 324. And it has been held, that an acknowledgment of an indefinite balance due on a claim will not save the bar of the statute as to any amount whatever. *Harrison v. Philler*, 32 Miss. 237. But it is the better opinion, that, if the acknowledgment is broad and particular enough in its terms to include a particular debt, the amount actually due may be proved by extrinsic evidence. *Barnard v. Bartholomew*,

22 Pick. 291; *Hazlebaker v. Reeves*, 12 Penn. St. 264; Ang. on Lim., § 239; *Dinsmore v. Dinsmore*, 21 Me. 433. And see *ante*, § 2, p. 289.

§ 6. **What is a sufficient written promise.** In England, by statute of 9 George IV, ch. 14, commonly known as "Lord Tenterden's Act," it is, among other things, enacted, that no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take a case out of the operation of the statute of limitations, unless such acknowledgment or promise be contained in some writing to be signed by the party chargeable thereby. Courts, by their decisions as to the effect of loose and unsatisfactory oral admissions and new promises, had almost frittered away the statute of limitations; and to remedy this, the above statute was enacted in England, and similar ones have been quite generally enacted in this country. See *Barlow v. Barner*, 1 Dill. (C. C.) 418; *Sigourney v. Drury*, 14 Pick. 389. The object in view was the prevention of fraud and perjury in proving an acknowledgment or a new promise, by rendering it necessary to procure that in writing for which words were previously sufficient. *Dickenson v. Hatfield*, 5 Carr. & P. 46. The intention was not to alter the law as to the nature of the promise, but merely to substitute a different mode of proof. *Haydon v. Williams*, 7 Bing. 163. The acknowledgment in writing must either amount to a distinct promise to pay, or to a distinct acknowledgment that the sum is due. *Bucket v. Church*, 9 Carr. & P. 209; *Linsell v. Bonsor*, 2 Bing. N. C. 241. And see *ante*, § 1, p. 287. The construction of a doubtful document, given in evidence to defeat the statute, is held to be for the court and not for a jury (*Snook v. Mears*, 5 Price, 636; *Sidwell v. Mason*, 2 Hurl. & N. 306); but if it is explained by extrinsic facts, they are for the consideration of the jury. *Morrell v. Frith*, 3 Mees. & W. 402; S. C., 3 Carr. & P. 246. Since Lord Tenterden's Act," above referred to, directed that no acknowledgment or promise shall be sufficient to take a case out of the statute, unless in writing, "and signed by the party chargeable thereby," an acknowledgment contained in a letter which was written by the wife of the debtor, in his name, and at his request, was held to be insufficient, because the statute gave no authority to an agent to make the acknowledgment. *Hyde v. Johnson*, 2 Bing. N. C. 776; S. C., 3 Scott, 289. But now, by statute of 19 and 20 Vict. ch. 97, § 13, an acknowledgment or promise made or contained by or in a writing signed by *an agent* of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

Where a debtor, being called upon by his creditor for a statement

of his affairs, made out an account, in which two promissory notes, overdue, were inserted as a debt for which he was liable to the creditor, it was held to be a sufficient acknowledgment. *Holmes v. Mackrell*, 3 C. B. (N. S.) 789. And it was further held that the whole document being in the handwriting of the defendant, his name written at the top was a sufficient signature to bind him. *Id.*

Since the adoption of the New York Code, parol promises and admissions are insufficient to avoid the statute of limitations in that State. *Fletcher v. Updike*, 67 Barb. 364. And see *Lunsing v. Blair*, 43 N. Y. (3 Hand) 48; *Van Alen v. Feltz*, 1 Keyes, 332; S. C., 4 Abb. Ct. App. (N. Y.) 439. So, a new promise, to bar the statute of limitations of Ohio, must be in writing. *Cleveland v. Duryea*, 1 Cinc. (Ohio) 324; *Horseley v. Billingsley*, 19 Ohio St. 413. So, in Nevada. *Taylor v. Hendrie*, 8 Nev. 243. So, in Indiana. *Kisler v. Sanders*, 40 Ind. 79; *Ketcham v. Hill*, 42 id. 64; and, so in North Carolina. *Fleming v. Slaton*, 74 No. Car. 203. The statute of Kansas requires the acknowledgment to be in writing and signed by the party; and the acknowledgment must be of an existing liability with respect to the contract upon which a recovery is sought. *Barlow v. Barner*, 1 Dill. (C. C.) 418; *Green v. Goble*, 7 Kans. 297. Under the Massachusetts statute, providing that the acknowledgment of a debt must be in writing and signed by the party to be charged, in order to take the debt out of the statute of limitations, it is held that an account stated, which is not supported by evidence of some writing, signed by the party to be charged, will not prevent the running of the statute against the previously existing liabilities included therein. *Chace v. Trafford*, 116 Mass. 529; S. C., 17, Am. Rep. 171. In Georgia, a new promise, to prevent the bar of the statute of limitations, must be in the handwriting of the maker, or subscribed by him or some one authorized by him, and the holder thereof cannot be the agent so authorized. *Wright v. Bessman*, 55 Ga. 187.

Where an executor included, in his inventory of the estate, a promissory note given by him to the testator, which was then outlawed, it was held that this was a sufficient acknowledgment, in writing, to remove the bar of the statute of limitations. *Ross v. Ross*, 6 Hun (N. Y.), 80; *Olark v. Van Amburgh*, 14 id. 558.

Under a statute of limitations which requires a new promise to be in writing, indorsements of payments upon a note, if relied upon as suspending the statute, should appear to be in the proper handwriting of the debtor. Indorsements made in the handwriting of the creditor, although with the knowledge of the debtor at the time, are not suffi-

cient. *Areaux v. Mayeux*, 23 La. Ann. 172. But see *Baker v. Mitchell*, 59 Me. 223.

In order that a new promise should have the effect of removing the bar of the statute of limitations in Mississippi, such promise must be in writing, or else the original claim must be presented to the debtor and acknowledged by him to be due. *Lamkin v. Nye*, 43 Miss. 241.

When a written promise to pay a debt barred by the statute has been lost, oral evidence of the contents of the writing may be given. *Haydon v. Williams*, 7 Bing. 163; S. C., 4 M. & P. 811.

§ 7. **Promise, by whom made.** An acknowledgment, in writing, given by an infant, of a debt due for necessities, is effective for the purpose of taking the debt out of the statute. *Willins v. Smith*, 4 El. & Bl. 180.

So, a new promise, or what is equivalent to it, made by congress, will take a case out of the statute; but the promise must be clear and distinct. *Cross' Case*, 2 Ct. of Cl. 271.

But an acknowledgment of the debt by the personal representative of the original debtor, deceased, will not take a case out of the statute. *Thompson v. Peter*, 12 Wheat. 565; *Clarke v. Jenkins*, 3 Rich. (So. Car.) Eq. 318; *Tazewell v. Whittle*, 13 Gratt. (Va.) 329; *Bunker v. Athearn*, 35 Me. 364; *Peck v. Botsford*, 7 Conn. 172; *Fritz v. Thomas*, 1 Whart. (Penn.) 66; *Phillips v. Beal*, 32 Beav. 26; *Tullock v. Dunn*, Ry. & M. 416. Nor, can a debt which is barred by the statute, at the death of the debtor, be revived by the *promise* of his personal representative to pay it. *Gailly v. Washington*, 2 Harr. (Del.) 204; *Conoway v. Spicer*, 5 id. 425; *Pitts v. Wooten*, 24 Ala. 474; *Peck v. Wheaton*, Mart. & Y. (Tenn.) 353; *Huntington v. Bobbitt*, 46 Miss. 528; *Forney v. Benedict*, 5 Penn. St. 225; *Moore v. Hillebrant*, 14 Tex. 312. And it makes no difference, in such case, that the creditor was one of two joint administrators, and that the promise was made to him by his coadministrator. *Seig v. Acord*, 21 Gratt. (Va.) 365; S. C., 8 Am. Rep. 605. See Vol. 3, tit. Executors and Administrators. But, it is held that a proposal by an executor to pay a note against the estate which he represents, before it is barred, if the holder will throw off the interest, is sufficient to suspend the statute. *Walker v. Cruikshank*, 23 La. Ann. 252. And see *Northcut v. Wilkinson*, 12 B. Monr. (Ky.) 408.

In a recent case in New Jersey, it was held, upon a full review of the cases, that an executor has the power, by a new promise, to remove the bar of the statute of limitations, and that such promise may be proved in the same way as in other cases, being always sufficiently careful to see that the deduction is properly drawn from the facts. *Shreve v. Joyce*, 36 N. J. Law, 44; S. C., 13 Am. Rep. 417.

The admission by one partner of a partnership debt, after the dissolution of the partnership but before the statute of limitations has taken effect, has been held to be sufficient to remove the bar of the statute as to all the partners. *Walton v. Robinson*, 5 Ired. (No. Car.) L. 341; *Fellows v. Guimarin*, Dudley (Ga.), 100; *Beardsley v. Hall*, 36 Conn. 270; 4 Am. Rep. 74. But see *contra, post*, pp. 305, 306, §§ 14, 15. But after a debt due from a partnership is once barred by the statute, and after the dissolution of the partnership, a promise by one partner to pay the debt, or an acknowledgment of the indebtedness by him, does not revive the debt against his copartners. *Belote v. Wynne*, 7 Yerg. (Tenn.) 534; *Steele v. Jennings*, 1 McMull. (So. Car.) 297; *Brewster v. Hardeman*, Dudley (Ga.), 138; *Newman v. McComas*, 43 Md. 70; *Payne v. Slate*, 39 Barb. 634; S. C. affirmed, 29 N. Y. (2 Tiff.) 146.

It has been held that the acknowledgment of a debt by one of several joint defendants is sufficient to take the case out of the statute as to them all. *Cox v. Bailey*, 9 Ga. 467; *Wheelock v. Doolittle*, 18 Vt. 440; *White v. Hale*, 3 Pick. 291. But see *Watts v. Devor*, 1 Grant's (Penn.) Cas. 267; *Lingan v. Henderson*, 1 Bland (Md.), 236; *True v. Andrews*, 35 Me. 183. See *contra, post*, pp. 305, 306, §§ 14, 15. An acknowledgment of a debt, or a new promise, by the maker of a promissory note, takes it out of the statute only so far as he is concerned. *Gardiner v. Nutting*, 5 Me. 140. But does not affect the rights or obligations of collateral parties. *Id.*; *Lowther v. Chappell*, 8 Ala. 353; *Dean v. Munroe*, 32 Ga. 28. And see *Grant v. Ashley*, 12 Ark. 762; *Wooddy v. State Bank*, *id.* 780. An acknowledgment of a debt by one of two debtors, who are only severally liable, cannot suspend the running of the statute in favor of the other. *Stowers v. Blackburn*, 21 La. Ann. 127.

A promise by the husband to pay the debt of the wife, contracted when sole, is not in law the promise of the wife, and will not take the demand, as against her, out of the influence of the statute. *Moore v. Leseur*, 18 Ala. 606. Nor, in such case, will the promise of the husband remove the bar of the statute, in a suit against husband and wife. *Powers v. Southgate*, 15 Vt. 471. And a promise by husband and wife to pay a debt of the wife before marriage, which was barred by the statute, does not revive the debt, on the death of the husband, so as to give an action against the wife. *Kline v. Guthart*, 2 Penr. & W. (Penn.) 490.

One who has been found, on inquisition, a habitual drunkard, cannot revive a note barred by the statute. *Hannum's Appeal*, 9 Penn. St. 471. A promise by an individual member of a college corporation will not take a debt due from the college out of the statute. *Lyman*

v. Norwich University, 28 Vt. 560. And see *Martin v. Fox, etc., Co.*, 19 Wis. 552. And it is held that a consent by an administrator to refer to arbitration the amount due on a covenant, barred by the statute during the life of his intestate, will not take the case out of the statute, although the reference is in pursuance of a provision in the covenant.

Wilson v. Wilson, 1 McMull. (So. Car.) Ch. 329. In an action by a principal against his factor, a paper purporting to be an account of sales, but not proved to have been executed by the defendant or by his authority, cannot relieve the demand from the statute bar, especially where it does not appear how it came into the plaintiff's possession.

White v. Fulkerson, 24 Tex. 635. And a mortgage deed, duly executed, acknowledged, and recorded, but not delivered, found among the papers of the mortgagor after his death, to secure the payment to the mortgagee of a demand barred by the statute, was held to be insufficient to prevent the operation of the statute. *Merriam v. Leonard*, 6 Cush. 151.

In the absence of any legislative enactment to the contrary, an acknowledgment by an agent of the debtor, such as would bind the principal if directly made by him, is sufficient to take a case out of the statute. See Ang. on Lim., § 272; *Bell v. Morrison*, 1 Pet. 351; *Anderson v. Sanderson*, 2 Stark. 204; *Palethorp v. Furnish*, 2 Esp. 511, *n.* Thus where an agent had been employed to pay money for work done, and the workmen were referred to him for payment, and he assented to it, an acknowledgment or a promise by him to pay was deemed sufficient. *Burt v. Palmer*, 5 Esp. 145.

§ 8. **Promise to whom made.** It has been held that an acknowledgment made to a stranger, in the absence of the creditor, will defeat the operation of the statute, as raising an implied promise. See *Newkirk v. Campbell*, 5 Harr. (Del.) 380; *Whitney v. Bigelow*, 4 Pick. 110; *St. John v. Garrow*, 4 Port. (Ala.) 223. But it seems to be otherwise in England since the statute of 9 Geo. IV, ch. 14. See *Grenfell v. Girdlestone*, 2 You. & Col. 662; *Fuller v. Redman*, 26 Beav. 614; *Goate v. Goate*, 37 Eng. L. & Eq. 486. And according to the very decided weight of the latest decisions in this country, a promise to pay a debt, made to a person not legally or equitably interested in the same, and who does not pretend to have had any authority from the creditor to call upon the debtor in relation to the debt, will not avoid the bar of the statute. *Ringo v. Brooks*, 26 Ark. 540; *Gillingham v. Gillingham*, 17 Penn. St. 302; *Morehead v. Wriston*, 73 No. Car. 398; *Parker v. Shuford*, 76 id. 219; *Wachter v. Albee*, 80 Ill. 47; *McGrew v. Forsyth*, id. 596; *Kisler v. Sanders*, 40 Ind. 78; *Sibert v. Wilder*, 16 Kans. 176; S. C., 22 Am. Rep. 280; *Fletcher v.*

Updike, 67 Barb. 364; *Cape Girardeau County v. Harbison*, 58 Mo. 90; *Trousdale v. Anderson*, 9 Bush (Ky.), 276. An acknowledgment made to the agent of the creditor, without the knowledge of the debtor that he was such agent, has no more force than if made to a stranger. *McKinney v. Snyder*, 78 Penn. St. 497.

But it is held that an admission to an executor or administrator is sufficient to take a case out of the statute. *Jones v. Moore*, 5 Binn. (Penn.) 573; *Martin v. Williams*, 17 Johns. 330. So, it is held that a promise made to the holder of a chose in action, taking a case out of the statute, is good for the assignee of such holder. *Soulden v. Van-Rensselaer*, 9 Wend. 293.

A promise made by a debtor to the attorney of his creditor will suspend the operation of the statute of limitations. *Kirby v. Mills*, 78 No. Car. 124; 24 Am. Rep. 460.

§ 9. **Part payment.** The mere fact of the payment of a sum by a debtor to his creditor is not enough to take a case out of the statute of limitations. But, if the debtor makes the payment with the understanding that it shall be treated as a payment on his debt, this will be sufficient to revive the cause of action barred by the statute. *Carroll v. Forsyth*, 69 Ill. 127; *Tippets v. Heane*, 1 Cr. M. & R. 252. The principle on which part payment operates to take a case out of the operation of the statute is, that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment. *Id.*; *Whitcomb v. Whiting*, 2 Doug. 652; *Smith v. Simms*, 9 Ga. 418; *Ayer v. Hawkins*, 19 Vt. 28. Thus, if a debtor admits a certain sum to be due by him and denies that a larger sum claimed is due, a payment of the exact amount admitted cannot be converted by the creditor into a payment, on account of the larger sum denied, so as to take the claim for such larger sum out of the statute. *United States v. Wilder*, 13 Wall. (U. S.) 254. Where a party, on being applied to for interest, paid a sovereign, and said he owed the money, but would not pay it, it was held to be a question for the jury to say, whether he intended to refuse payment or merely spoke in jest. *Wainman v. Kynman*, 1 Exch. 118.

The effect of a part payment in taking a case out of the operation of the statute is not derived from any statutory provision, but results from the decisions of the courts, and depends wholly upon the reason of those decisions. This reason is, that a part payment made on account of a claim is an acknowledgment by the debtor of his liability for the whole demand; and from this acknowledgment a new promise

on his part to pay the residue is implied. The undertaking of the debtor, as to the unpaid part of the debt, is thus, by a legal presumption, renewed and made to date from the time of the part payment.

VanKeuren v. Parmelee, 2 N. Y. (2 Comst.) 523; *Harper v. Fairley*, 53 N. Y. (8 Sick.) 442. And see *Hopkins v. Stout*, 6 Bush (Ky.), 375. From giving security for a part or the whole within six years (*Manderston v. Robertson*, 4 Man. & Ry. 440; *Balch v. Onion*, 4 Cush. 559), or a negotiable note (*Ilsey v. Jewett*, 2 Mete. [Mass.] 168), an acknowledgment or new promise may be inferred (Id.); and the payment of interest has the same effect as payment of a part of the principal. *Wyatt v. Hodson*, 8 Bing. 309; *Murcelin v. Creditors*, 21 La. Ann. 423; *Bealy v. Greenslade*, 2 Tyrw. 121; S. C., 2 C. & J. 61; *Sigourney v. Drury*, 14 Pick. 387. Payment of interest upon a note payable on demand is sufficient to take a case out of the statute, although there is no independent evidence that any demand of payment of the note has been made. *Bamfield v. Tupper*, 7 Exch. 27. See *Morgan v. Rowlands*, L. R., 7 Q. B. 493; S. C., 2 Eng. Rep. 611. And to constitute a payment of interest sufficient to take a debt out of the statute, it is not essential that money should actually pass between the debtor and the creditor. *Maber v. Maber*, L. R., 2 Exch. 153. And see *Black v. Dorman*, 51 Mo. 31.

But an indorsement in the handwriting of the debtor, but not signed by him, of a payment of a part of a promissory note, will not prevent the operation of the statute, if no money or other valuable consideration actually passes between the parties, even though the parties, at the time of the indorsement, orally agree that it shall be deemed to be a payment. *Blanchard v. Blanchard*, 122 Mass. 558; 23 Am. Rep. 397.

As it regards promissory notes and bonds, the common medium of proof of a part payment, or of interest, is an indorsement of it thereon. See *Gale v. Capern*, 1 Ad. & El. 102; *Chandler v. Lawrence*, 3 Mich. 261; *Sibley v. Phelps*, 6 Cush. 172; *Dowling v. Ford*, 11 Mees. & W. 325. But it is essential that such indorsement be made *bona fide*, and with the privity of the debtor (*Butcher v. Hixton*, 4 Leigh [Va.], 519; *Roseboom v. Billington*, 17 Johns. 182; *Brown v. Hutchings*, 11 Ark. 83; *English v. Wathen*, 9 Bush [Ky.], 387; *Kyger v. Ryley*, 2 Neb. 20); otherwise, the indorsement is not of itself sufficient evidence of a payment to repel a defense created by the statute. Id.; *Phillips v. Mahan*, 52 Mo. 197; *Harper v. Fairley*, 53 N. Y. (8 Sick.) 442. And see *Knight v. Clements*, 45 Ala. 89; 6 Am. Rep. 693.

It has been held that a part payment made upon Sunday will not take a debt out of the operation of the statute. *Clapp v. Hale*, 112

Mass. 368; S. C., 17 Am. Rep. 111. But see *contra*, *Beardsley v. Hall*, 36 Conn. 270; S. C., 4 Am. Rep. 74; *ante*, pp. 291, 292, § 2. So, a payment by operation of law, or acknowledged by the creditor on account of an equitable set-off or counter-claim, which the debtor might insist upon, but which he has never claimed to have applied as such, is not such a payment as will operate to prevent the statute from running. *Anderson v. Baxter*, 4 Oreg. 105. And see *ante*, p. 265, art. I, § 21. And the payment of a sum of money on an open book account, which has never been presented or recognized in its entirety, is not a fact from which alone a promise to pay can be inferred, so as to take the whole account out of the statute. *Vaughn v. Hankinson*, 35 N. J. Law, 79.

Where a payment is made on a claim for legal services larger than any one item thereof, with no directions as to its application, and there are no circumstances from which such direction can be inferred, it is a good part payment under the statute of limitations, and an action may be maintained upon such claim at any time within the period of limitation thereafter. *Bowe v. Gano*, 9 Hun (N. Y.), 6. So, a payment by an attorney of the principal or interest on demands, collected by him for his client, prevents the operation of the statute to bar the client's right of action against such attorney for collections retained by him. *Torrence v. Strong*, 4 Oreg. 39. And it has been held that a partial payment within the period of limitation upon a sum due on account for the sale of a single article of property takes the balance of the claim out of the statute. *Benjamin v. Webster*, 65 Me. 170. See *ante*, p. 265, art. I, § 21.

But where there are two clear and undisputed debts, the case is not taken out of the statute, as to either debt, by evidence of a part-payment within the period of limitation, not specifically appropriated to the one debt or the other. *Burn v. Boulton*, 2 C. B. 476. See *ante*, p. 265, art. I, § 21. And part payment after action brought will not take a debt out of the statute. *Bateman v. Pinder*, 3 Q. B. 574. And see *Collyer v. Willock*, 4 Bing. 313.

§ 10. **Part payment in property.** A delivery of goods by a debtor to his creditor in liquidation of a previous debt is a sufficient part payment. *Hart v. Nash*, 2 Cr. M. & R. 337; *Hooper v. Stevens*, 4 Ad. & El. 71; *Butts v. Perkins*, 41 Barb. 509; *Sibley v. Lumbert*, 30 Me. 253. And it has been held that an agreement to take certain articles of property in existence toward the payment of a note operates as payment for the purposes of the statute from the time of the agreement, and not from a subsequent time, when the holder of the note actually obtains the property and indorses it on the note. *Lincoln v.*

Johnson, 43 Vt. 74. So when the promissory note of a third person is delivered in part payment, the statute begins to run from the time when the debtor delivered the note to the creditor, and not from the time when the note was paid. *Smith v. Ryan*, 66 N. Y. (21 Sick.) 352; 23 Am. Rep. 60. *Harper v. Fairley*, 53 N. Y. (8 Sick.) 442. See the next section.

Paying money into court for goods sold and delivered, does not deprive a defendant of the benefit of the statute as to the residue of the demand. *Long v. Greville*, 3 Barn. & C. 10; S. C., 4 D. & Ry. 632.

§ 11. **Part payment by bill or note.** The delivery by a debtor to a creditor of a bill or note, as collateral security for, or as a provisional or conditional payment, in part, of his debt, is equally significant as an acknowledgment of liability for the whole demand, as would be an absolute payment of a like amount, and is equally effectual to suspend the operation of the statute of limitations. The effect of the transaction is the same, whether the collateral security or conditional payment is made available, and results in the payment of any part of the debt, or not. *Turney v. Dodwell*, 3 El. & Bl. 136; *Smith v. Ryan*, 7 Jones & Sp. (N. Y.) 489; S. C., 66 N. Y. (21 Sick.) 352; S. C., 23 Am. Rep. 60. It is, however, only evidence of an acknowledgment and promise to pay at the time of the delivery of the note, not at the time of its maturity, or when it is paid by the maker. *Id.*; *Harper v. Fairley*, 53 N. Y. (8 Sick.) 442; *Irving v. Veitch*, 3 Mees. & W. 90; *Gowan v. Forster*, 3 B. & Ad. 507. But see *Whipple v. Blackington*, 97 Mass. 476.

§ 12. **Part payment by whom made.** See *ante*, § 7, p. 298. The principle is recognized in all the cases, that a part payment, which is to operate as an acknowledgment, must be made by the debtor or his authorized agent; that is, an agent having authority to make a new promise or to perform for the party the very act which is to be the evidence of a new promise. *First National Bank of Utica v. Ballou*, 2 Lans. (N. Y.) 120; S. C. affirmed, 49 N. Y. (4 Sick.) 155; *Smith v. Ryan*, 7 Jones & Sp. (N. Y.) 489; S. C. affirmed, 66 N. Y. (21 Sick.) 352; 23 Am. Rep. 60. And a payment made by a third person, on behalf of a debtor, without authority from him to make it, cannot remove the bar of the statute, because it does not imply any acknowledgment of indebtedness by the debtor. *Smith v. Coon*, 22 La. Ann. 445. And see *ante*, § 9, p. 301. Where A held a bond executed by B and payable to C, and a set-off in favor of B was allowed and entered on the bond by A, it was held that this was not a part payment as to C, and did not repel the presumption of payment. *Woodhouse v. Simmons*, 73 No. Car. 30. So, a part payment made by a woman on her husband's note will not take it out of the statute, if it

does not appear that the husband authorized her to make the payment. *Butler v. Price*, 110 Mass. 97.

But a payment of interest on a promissory note, by the maker, in the name and behalf of, and as agent for, an accommodation indorser, subsequently recognized and approved of by the latter, who had full knowledge of the facts, will take the note out of the statute of limitations, as effectually as if made by the indorser himself, no matter whose money was used in making the payment. *First National Bank of Utica v. Ballou*, 49 N. Y. (4 Sick.) 155.

§ 13. **Part payment, to whom made.** See *ante*, § 8, p. 300, and cases cited.

§ 14. **Promise or payment by one debtor.** See *ante*, § 7, p. 298. The doctrine that a promise or acknowledgment by one joint debtor takes the debt out of the statute of limitations, and binds his co-contractor, upon the ground that he who makes the promise virtually acts as the agent of the others (See *Burleigh v. Stott*, 8 Barn. & C. 36; *Channell v. Ditchburn*, 5 Mees. & W. 494), originated in the case of *Whitcomb v. Whiting*, 2 Doug. 652; and the decision in this case must be regarded as the cause of all the confusion which exists in the decisions, both in England and this country, on the subject of the statute, in respect to joint debtors. The doctrine has been somewhat restricted in England by the later decisions. See *Atkins v. Tredgold*, 2 Barn. & Cres. 23; *Davies v. Edwards*, 6 Eng. L. & Eq. 520; *Ridd v. Moggridge*, 2 Hurl. & N. 567. In this country, the English doctrine enunciated in *Whitcomb v. Whiting*, 2 Doug. 652, has been approved in some of the States. An admission by one partner, after dissolution, but before the statute has run, has been held to renew it as to all the partners (*Beardsley v. Hall*, 36 Conn. 270; 4 Am. Rep. 74; *Merritt v. Day*, 38 N. J. 32; 20 Am. Rep. 362. See *Wheelock v. Doolittle*, 18 Vt. 440; *Mix v. Shattuck*, 50 id. 421; *Foute v. Bacon*, 24 Miss. 156; *Whittaker v. Rice*, 9 Minn. 13; *Block v. Dorman*, 51 Mo. 31; *Schindel v. Gates*, 46 Md. 604; S. C., 24 Am. Rep. 524; *Disborough v. Bidleman*, 20 N. J. Law, 275; *Corlies v. Fleming*, 30 id. 349; *Getchell v. Heald*, 7 Me. 26); in others, it has been silently acquiesced in or left doubtful, and in a considerable number it has been expressly overruled. See *Van Keuren v. Parmalee*, 2 N. Y. (2 Comst.) 523; *Harper v. Fairley*, 53 N. Y. (8 Sick.) 442; *Hunter v. Robertson*, 30 Ga. 479; *Succession of Voorhies*, 21 La. Ann. 659; *Hance v. Hair*, 25 Ohio St. 349; *Coleman v. Fobes*, 22 Penn. St. 160. So, in the supreme court of the United States, it has been overruled, as unfounded in principle. *Bell v. Morrison*, 1 Pet. (U. S.) 618. In a recent case in Kansas, it

is held that partial payment, made by one debtor on a note, will not suspend the running of the statute in favor of the other debtors thereon, although the party paying be the principal debtor, and the others only sureties. *Steele v. Souder*, 20 Kans. 39; *Knight v. Clements*, 45 Ala. 89; 6 Am. Rep. 693. And in *Mayberry v. Willoughby*, 5 Neb. 369; S. C., 25 Am. Rep. 491, the rule is laid down, that a promise by one joint debtor will not take a debt out of the statute, as to his co-contractors, unless he is specially and severally authorized by them for that purpose. *Bush v. Stowell*, 71 Penn. St. 278; 10 Am. Rep. 694. And see *Pitts v. Hunt*, 6 Lans. (N. Y.) 146; S. C. affirmed, 61 N. Y. (16 Sick.) 637, and cases cited *ante*, § 12, p. 304.

§ 15. **Promise by agent, executor, etc.** See *ante*, § 7, p. 298, where the cases are fully collected. In Missouri, part payment upon a bond made by the administrator of one of joint makers, within the statutory period, will prevent the running of the statute in favor of the remainder. *Vernon County v. Stewart*, 64 Mo. 408.

Part payment or a new promise upon an outlawed firm debt, made by one partner, after dissolution, does not revive the debt against other partners who did not authorize it. *Mayberry v. Willoughby*, 5 Neb. 368; S. C., 25 Am. Rep. 491. And it has been held to make no difference whether such part payment was made before or after the action was barred by the statute; that in neither case did the payment affect the running of the statute, as to the partner who did not make or authorize it. *Graham v. Selover*, 59 Barb. 314; S. C. affirmed, 46 How. 107; 50 N. Y. (5 Sick.) 691. But it is held in New Jersey, that payment of interest on a note drawn by a firm, by one of its members after the dissolution of the firm, but within six years after the maturity of the note, will renew it, as against the statute; nor will the fact that one of the firm is a married woman alter the effect of such renewal. *Merritt v. Day*, 38 N. J. Law, 32; S. C., 20 Am. Rep. 362. And see *ante*, p. 289, § 7.

It has been held in Vermont, that payments made by the treasurer of a partnership from partnership funds, and by him indorsed on a partnership note, take the note out of the statute, in the absence of any showing that he acted without authority and without duty. *Walker v. Wait*, 50 Vt. 668.

§ 16. **Promise to agent, executor, etc.** See *ante*, p. 292, § 3, and cases cited.

§ 17. **New promise as to torts.** See *ante*, p. 292, § 3. In general, where a cause of action for a tort is barred by the statute, a new promise is no answer to a defense of the statute, if pleaded. *Oothout v.*

Thompson, 20 Johns. 277; *Fritts v. Slade*, 9 Hun (N. Y.), 145; *Avant v. Sweet*, 1 Brev. (So. Car.) 228.

§ 18. **Payments must be voluntary.** A payment is a tacit acknowledgment of the debt, if voluntarily made; otherwise, it is not. Thus it was held, that a payment of a promissory note to a receiver of the so-called Confederate States, under compulsion, during the war, did not interrupt prescription. *New York Belting, etc., Co. v. Jones*, 22 La. Ann. 530. And no acknowledgment sufficient to interrupt prescription can be inferred from a payment, not by the debtor, but without his knowledge or participation, through a judicial proceeding to which he was no party. *Jacobs v. Calderwood*, 4 id. 509.

§ 19. **Oral admission of payment.** The statutory requirement, that an acknowledgment or new promise, to take a case out of the operation of the statute of limitations, must be in writing, does not alter the effect of a payment of principal or interest. Nor does it prescribe any new rule of evidence as to the fact of such payment; and it may be proved by the oral admissions of the debtor. *Cleave v. Jones*, 4 Eng. L. & Eq. 514; *Williams v. Gridley*, 9 Metc. 485; *Gilbert v. Collins*, 124 Mass. 174; *Sibley v. Lumbert*, 30 Me. 253; *Bernstein v. Ricks*, 21 La. Ann. 179; *First Nat. Bank of Utica v. Ballou*, 49 N. Y. (4 Sick.) 155. And such payment may be made by an agent, and the authority of the agent may be proved by parol evidence. *Id.*

But where the plaintiff relies on a part payment to remove the bar of the statute, the burden of proving it is upon him. *Knight v. Clements*, 45 Ala. 89; S. C., 6 Am. Rep. 693; *Lawrence v. Bridleman*, 3 Yerg. (Tenn.) 496. That a debtor accepted a credit on book-account on a present existing debt must plainly appear, and not be a matter of conjecture merely, to take the debt out of the operation of the statute. *Barclay's Appeal*, 64 Penn. St. 69.

§ 20. **Who may plead the statute.** See *ante*, p. 236, Art. I, § 9, where the cases are fully collected. A county or other municipal corporations may plead the statute (*Evans v. Erie County*, 66 Penn. St. 222; *ante*, p. 232, Art. I, § 7); and a parish in Louisiana may plead the defense of prescription. *Perry v. Vermilion*, 21 La. Ann. 645. A deputy sheriff is entitled, when sued for an act done in his official capacity, to the benefit of any limitation imposed by statute upon the time for commencing an action for the same cause against the sheriff. *Cumming v. Brown*, 43 N. Y. (4 Hand) 514.

And it is held that whatever may be the character of the demands against a deceased person, and whatever relation to his estate they may acquire under a suit in equity against his administrator, they stand but

as simple contract debts against the heirs of such deceased person. Hence, if barred, as such, by the statute of limitations, the heir may claim the benefit of that statute, notwithstanding they were reduced to judgment in a suit against the administrator. *Gilliland v. Caldwell*, 1 So. Car. 194. See *Garrett v. Pierson*, 29 Iowa, 304.

In an action upon a joint contract against several defendants, judgment may be recovered against a part of the defendants, although the statute has barred the action against the others. *Town v. Washburn*, 14 Minn. 268.

Under the practice in the courts of New Hampshire, any person who can satisfy the court that he has any rights involved in the trial of a case may be admitted to prosecute or defend the action (*Carlton v. Patterson*, 29 N. H. 586); and a party thus appearing may, in the discretion of the court, plead the statute of limitations. *Parsons v. Eureka Powder Works*, 48 N. H. 66.

§ 21. **How to plead it.** It is said that no rule of practice is more firmly settled than that, to render the statute of limitations available as a defense, it must be set up and relied on by the pleadings. See *Boyce v. Christy*, 47 Mo. 70; *Parker v. Irvin*, 47 Ga. 405; *Mansfield v. Doherty*, 21 La. Ann. 395; *Green v. North Carolina R. R. Co.*, 73 No. Car. 524; *Merryman v. State*, 5 Har. & J. (Md.) 425; *Robbins v. Harvey*, 5 Conn. 335. And this is true both at law and in equity. *Borders v. Murphy*, 78 Ill. 81. But see *Humbert v. Trinity Church*, 7 Paige 195; *Wisner v. Ogden*, 4 Wash. (C. C.) 631. And the statute must be pleaded, even where the cause of action appears on the face of the declaration to be out of time. *Hollis v. Palmer*, 2 Bing. N. C. 713. And being a strict defense, if the party omit to plead it the court will not relieve him by permitting him to amend by adding the plea. *Jackson v. Varick*, 2 Wend. 294; 40 Barb. 660. Nor will a default be taken off to allow the plea of the statute to be made. *State v. Jennings*, 10 Ark. 428; *Sheets v. Baldwin*, 12 Ohio, 120. But if a plaintiff amends his declaration, the defendant may plead the statute anew. *Nelson v. Bond*, 1 Gill (Md.), 218; *Reed v. Clark*, 3 McLean (C. C.), 480.

The reason which has been sometimes given for requiring the statute of limitations to be pleaded is, that the exceptions in favor of persons under disability might not be rendered useless, and they taken by surprise at the trial by finding the statute there first relied on. See Ang. on Lim., § 285. But the necessity to plead a statute of limitations applies to cases where the remedy only is taken away, and in which the defense is by way of confession and avoidance; not where the right and title to the thing is extinguished and gone, and the defense is by denial

of that right. *De Beauvoir v. Owen*, 5 Exch. 166. And the true reason for requiring the statute to be pleaded is held to be that it confesses and avoids the declaration, and therefore is not comprehended within any plea, which merely denies the whole or a part of the declaration. *Id.*; *Margetts v. Bays*, 4 Ad. & El. 489; *Gale v. Capern*, 1 id. 102.

The plaintiff in an action may reply fraud to a plea of the statute of limitations. *Campbell v. Vining*, 23 Ill. 525. See *ante*, p. 243, art. I, § 13. But if he intends to rely on fraud committed by the defendant as an answer to a plea of the statute, it must be replied specially, and cannot be taken advantage of under the replication that the latter did promise within the period of limitation. *Clarke v. Hougham*, 3 Dowl. & Ry. 322; S. C., 2 Barn. & C. 149.

A replication to the plea of the statute which sets up that the defendant fraudulently concealed from the plaintiff the knowledge that a cause of action existed, and that suit was brought within the statutory period, after knowledge of the right of action came to the plaintiff, must fully set out the facts relied upon as constituting such fraud, or it will be bad on demurrer. *Beatty v. Nickerson*, 73 Ill. 605.

The statute must be pleaded specially to a plea of set-off, and cannot be taken advantage of under a general replication of *nil debet*. *Chapple v. Durston*, 1 Cr. & Jerv. 1. See *Williams v. Willis*, 15 Abb. (N. S., N. Y.) 11. But in this country, according to the practice of most of the States, the statute may be set up against a debt introduced as a set-off, without being specially pleaded. See *Mann v. Palmer*, 3 Abb. Ct. App. 162; S. C., 2 Keyes, 177; *Harris v. Moberley*, 5 Bush (Ky.), 556. Though, in some courts, notice of the intention to rely on the statute is required. *Williams v. Perry*, 2 Strobl. (So. Car.) 170; *Trimyer v. Pollard*, 5 Gratt. (Va.) 460; *Levering v. Rittenhouse*, 4 Whart. (Penn.) 130. As a general rule, if the plaintiff would bring himself within any of the exceptions mentioned in the statute, he must specially reply accordingly, and if he omit so to do he cannot avail himself of it on the trial. *Witherup v. Hill*, 9 Serg. & R. (Penn.) 11; *Piggott v. Rush*, 4 Ad. & El. 912; Ang. on Lim., § 292.

Under some of the reformed codes of practice which have been adopted in many of the States, the objection that the claim alleged appears on the face of the complaint to have been barred by the statute of limitations may be taken by demurrer. See *Brennan v. Ford*, 46 Cal. 7; *Springer v. Clay County*, 35 Iowa, 241; *Vore v. Woodford*, 29 Ohio St. 245; *Hudson v. Wheeler*, 34 Tex. 356. But the statute must be pleaded unless the complaint shows clearly on its face that it has run against the demand. *Davenport v. Short*, 17 Minn. 24; *Parker v. Berry*, 12

Kans. 351. In Arkansas it is only when the complaint shows that the cause of action accrued more than the statute term before suit commenced, and also negatives the existence of any facts to avoid the bar of the statute, that the defense of the statute can be interposed by demurrer. *Collins v. Mack*, 31 Ark. 684.

Under the New York practice, when the answer contains new matter, constituting a counter-claim, such counter-claim cannot be barred by the statute of limitations, unless the same is specially pleaded in reply. *Clinton v. Eddy*, 1 Lans. (N. Y.) 61; S. C., 39 How. 23; 54 Barb. 54; *Williams v. Willis*, 15 Abb. (N. S., N. Y.) 11. See, also, *Curran v. Curran*, 40 Ind. 473.

CHAPTER XLII.

MARTIAL LAW.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. In general. When a State of war exists, the necessities of the case require that many acts should be done, in carrying on the war, which may be invasions of the ordinary rights of the citizen. The same acts in nature are done and in time of peace and the doing justified. The difference seems to be rather in the frequency of the acts and in the nature of the justification. Thus the prosecution of war involves a continual limitation upon those rights of life, liberty and property which are occasionally interfered with in time of peace. Men die violent deaths continually in peace, and no criminal, or even civil, wrong is done. It is justified as an accident, self defense, execution under warrant of law. They lose their liberty as criminals, as insane, in a less degree, even as jurors and other servants of the law. They lose their property. It is taken from them by process of law. But when war exists, life, liberty and property may be taken or destroyed, not without law or justification, but under different rules of law and subject to be justified in a different way. It must appear that civil law has yielded to martial law. The territory over which, and the time during which martial law prevails are matters to be determined by the political power. *Sutton v. Tiller*, 6 Cold. (Tenn.) 593. The martial law, besides the boundaries of time and space set to its jurisdiction, may also depend on the person of him on whom it is exercised. For instance, a soldier is subject to its laws in time of peace, and a militia man when called out. *Cox v. Gee*, 1 Wms. (No. Car.) L. 131. But over the person in civil life it has not power except during the time of war, and within the territory involved in the conflict. *Ex parte Milligan*, 4 Wall. 2; *Griffin v. Wilcox*, 21 Ind. 370; *Smith v. Shaw*, 12 Johns. 257. As between persons not in military service military law does not apply except when no civil authority remains and some substitute is necessary for it to preserve the safety of the army and of society, and

then it can only prevail until the laws have their free course. *McLaughlin v. Green*, 50 Miss. 453.

But it has been held that an army contractor is subject to military law and can be tried by court-martial. *Hill v. United States*, 9 Ct. of A. 178. Courts-martial are courts of limited and special jurisdiction, and the validity of their proceedings is to be tested by the rules applicable to other courts of limited jurisdiction, and their jurisdiction can be inquired into. *Moore v. Houston*, 3 Serg. & R. (Penn.) 169; *Mills v. Martin*, 19 Johns. 7; *Brooks v. Adams*, 11 Pick. (Mass.) 442; *Barrett v. Crane*, 16 Vt. 246. A judgment without notice to the defendant is void. *Meade v. Deputy Marshal*, 1 Brock. 324. But the judgment of a court-martial upon matters where it has jurisdiction is as conclusive as any judgment. *Com. v. McClean*, 2 Pars. (Penn.) Sel. Cas. 367. As long as it is acting within its jurisdiction, no prohibition lies to restrain irregular process. *State v. Wakely*, 2 Nott & Mc. (So. Car.) 410; *Washburn v. Phillips*, 2 Metc. (Mass.) 296. Its decisions cannot in such case be questioned by civil courts or on *habeas corpus*. *Com. v. Cornman*, 4 Serg. & R. (Penn.) 83. Even one who has appeared and pleaded guilty can contest the jurisdiction of a court-martial in an action of trespass against the officers executing its orders. *Duffield v. Smith*, 3 Serg. & R. 590; *Smith v. Shaw*, 12 Johns. 257. The existence of a state of war or of martial law may indirectly affect the operation of other courts. A non-resident alien enemy cannot sue a citizen. *Hepburn's Case*, 3 Bland (Md.), 95; *Sunderson v. Morgan*, 39 N. Y. (12 Tiff.) 231; *Knoefel v. Williams*, 30 Ind. 1. His right to sue is said to depend not so much on his legal domicile as upon his actual residence, and whether the effect of his recovery in the action may be to aid the enemy. *Lacharie v. Godfrey*, 50 Ill. 186. An alien enemy may be made a defendant and appear by attorney by leave of court. *Russ v. Mitchell*, 11 Fla. 80. But although suits against alien enemies who do not appear have been allowed. *Seymour v. Bailey*, 66 Ill. 288. It now appears settled that proceedings against one who had been expelled and sent within the enemy's territory are void. *Lasere v. Rochereau*, 17 Wall. 437. But a foreclosure of or a sale under a mortgage is valid though the mortgagor is within the enemy's lines and unable to return and redeem. *De Jarnett v. De Giverville*, 56 Mo. 440. The proclamation of peace terminated the late war and absolved all offenses during its continuance. There can be no trial before a military tribunal after that date as a spy or for arson. *Matter of Martin*, 45 Barb. 142. The action of congress in allowing damages for injury to private property by troops, is conclusive and cannot be revised by the courts. *United States v. Williams*, 5 McL. 133.

§ 2. **When a defense for acts done.** The president has a right to govern by his military officers when and where the civil power is suspended by force. In all other times and places the civil, excludes martial law, and government by the war power. *Griffin v. Wilcox*, 21 Ind. 370. The military force have a right, while in occupation of friendly territory, to take, under military necessity, for use or destroy private property without first making compensation. This necessity is not that overpowering necessity which admits no alternative, but if the interests at stake may be more probably promoted by the appropriation of the property, it may be taken. *Taylor v. Nashville Railroad*, 6 Coldw. (Tenn.) 646. If taken for permanent use, it does not revert on abandonment, and if sold a good title passes. *Wellman v. Wickerman*, 44 Mo. 484. But in *Farmer v. Lewis*, 1 Bush (Ky.), 66, it is said to justify the seizure and appropriation of private property by a military commander on the ground of necessity for subsistence or otherwise, the necessity must be urgent and such as will admit of no delay, and a case where the civil authority would be too late in providing the means required for the occasion, and if the power is claimed as a necessary step to prevent the property from falling into the hands of the enemy, such danger must be immediate and pressing. *McLaughlin v. Green*, 50 Miss. 453. It is equally a justification though the destruction is by a belligerent not recognized as an independent government, as for instance, the Confederate States. *Ford v. Surget*, U. S. Sup. Ct., 18 Alb. L. J. 493. See *Smith v. Brazelton*, 1 Heisk. (Tenn.) 44; 2 Am. Rep. 678. The officers and agents of such government are protected. *Jones v. Williams*, 41 Tex. 390. It has been held that the judgment of the commanding officer was conclusive on the question of necessity. *Drehman v. Stifel*, 41 Mo. 184. The commander of a detached post has the powers of the commander of a department and is under no personal liability for his acts within his power, as for instance, for taking arms from citizens as belonging to the government, or for the purpose of disarming them. *Sutton v. Tiller*, 5 Coldw. (Tenn.) 593. A military officer is justified in ordering the discontinuance of a ferry on a boundary river between belligerent countries. *Ogden v. Lund*, 11 Tex. 688. The subordinate officer is justified by the orders of his superior in all points within the apparent scope of his authority. *Despan v. Olney*, 1 Curt. (U. S.) 306; *Weatherspoon v. Woodey*, 5 Coldw. (Tenn.) 149. Thus a marshal is protected in executing the sentence of a court-martial. *Moore v. Houston*, 3 S. & R. (1 Penn.) 169. But it must appear that the court-martial was regularly constituted and that it conformed to the law in all material points. *Wilson v. John*, 2 Binn. (Penn.) 209; *Fox*

v. *Wood*, 1 Rawle (Penn.), 143. The members of the court-martial are not liable to action for acts done under their sentence where it is within their jurisdiction, unless corruption or malice is proved. *Macon v. Cook*, 2 Nott & McC. (So. Car.) 379; *Shoemaker v. Nesbit*, 2 Rawle (Penn.), 201. The orders of a military superior may amount to duress which will excuse acts done unwillingly under it. *Weatherspoon v. Woodey*, 5 Coldw. (Tenn.) 149. Where an officer orders the seizure of a vessel loaded with arms in order to preserve neutrality, and it is lost without his fault, he is not personally liable. *Stoughton v. Dimick*, 3 Blatchf. (U. S.) 356. A soldier actually and rightfully in the army can have no relief by *habeas corpus* against any abuse of military authority. *Cox v. Gee*, 1 Wins. (No. Car.) L., No. 2, p. 131. As we have said, the proclamation of peace absolved all offenses cognizable by martial law before military tribunals. *Matter of Martin*, 45 Barb. 142. Hostile property which constitutes a reliance of the enemy for means to purchase arms and supplies, for example, cotton in the late war, is liable at any time to seizure and destruction without regard to the individual sentiments of its owners, and whether the result of such seizure or destruction would be to strengthen our forces or to decrease and cripple the forces of the enemy. *Young v. United States*, 96 U. S. (so cited 13 Alb. L. J. 495, and not found); *Ford v. Surget*, U. S. Sup. Ct., 18 Alb. L. J. 493. The capture by the enemy of a part of his precinct excuses an officer for not levying the execution on property previously attached there, but if he has delivered the goods to receiptors he is not discharged, for he can enforce their contract after peace. *Congdon v. Cooper*, 15 Mass. 10.

§ 3. **When not a defense.** In a State where the courts are open and undisturbed, a military commission appointed by a military commander cannot try a citizen not in the military service, nor captured while engaged in acts of hostility to the government. *Ex parte Milligan*, 4 Wall. 2. A military commission to try civil cases is invalid. *Walsh v. Porter*, 12 Heisk. (Tenn.) 401. In all places where the civil power is not suspended, civil law excludes martial law and government by the war power. *Griffin v. Wilcox*, 21 Ind. 370. A citizen cannot be subjected to the rules and articles of war until he is in actual military service. *Kneedler v. Lane*, 45 Penn. St. 238. The president has no power either in his civil or military capacity to order the arrest or imprisonment of a person not subject to military law. *Jones v. Seward*, 40 Barb. 563. A citizen not in the service cannot be punished by martial law for discouraging voluntary enlistments or forcibly resisting draft. *Re Kemp*, 16 Wis. 359. A soldier cannot justify on the ground that he was obeying the orders of his superior

officer, if such orders were illegal and not justified by the rules and usages of war and such that any person of common sense would know them to be illegal or criminal. *Riggs v. State*, 3 Coldw. (Tenn.) 85. If a court-martial proceed in a case when it clearly has no jurisdiction, the members of the court and the officers who undertake to execute its sentence are all trespassers. *Wise v. Withers*, 3 Cranch, 331; *Smith v. Shaw*, 12 Johns. 257. Nor will the martial law shield an officer from the general consequences of his act if he violate the criminal law of the State (*Com. v. Palmer*, 2 Bush [Ky.], 570); or commits a clearly illegal trespass upon the property of another (*Mitchell v. Harmony*, 13 How. [U. S.] 115); or if he uses his military authority as a mere pretext to extort property, or in a wanton and abusive manner. *Sutton v. Tiller*, 6 Coldw. (Tenn.) 593. Thus, after the capture of New Orleans, the military commander had no right to seize private property as booty or confiscate it. *Planters' Bank v. Union Bank*, 16 Wall. 483. A citizen or a corporation is liable for an unauthorized appropriation of an enemy's private property, whether the possession be obtained by a mere trespass, or through the form of a purchase under an illegal judgment of a court. *Louisville & Nashville R. R. Co. v. Buckner*, 8 Bush (Ky.), 277; 8 Am. Rep. 462. An order is no justification to an inferior officer in the impressment of property, if the jury find that there was no pressing emergency. *Sellards v. Zomes*, 5 Bush (Ky.), 90; *Koonce v. Davis*, 72 No. Car. 218. One who arrests spies or deserters cannot seize and carry away or turn over to the government property found on them. *Clark v. Cumins*, 47 Ill. 372; *Britton v. Butler*, 9 Blatchf. 456. But in *Allen v. Colby*, 47 N. H. 544, officers who were in pursuit of a person who was absenting himself from the country to avoid a draft and who had good reason to believe him to be concealed near were protected in seizing and holding a valise with his clothing for the purpose, in good faith, of effecting his arrest. Neither the right to impress or to exact military contribution belongs to every petty officer but the orders must come from the commander of a district post or army. *Lewis v. McGuire*, 3 Bush (Ky.), 202. A title by capture cannot be acquired or set up by unorganized marauding parties. *Worthy v. Kinamon*, 44 Ga. 297.

§ 4. **War as a defense on contracts.** It is a settled principle of law that no trade or contract is lawful by which aid or encouragement is given to the enemy, where the parties reside on opposite sides of the military lines; the presumption is that their contracts are illegal and void. *Hennen v. Gilman*, 20 La. Ann. 241. No suit can be maintained for goods sold, services rendered, or money borrowed, nor can damages for breach of contract be recovered where the effect would be

to aid rebellion. *Shepherd v. Reese*, 42 Ala. 329. Thus, in *Potts v. Bell*, 8 T. R. 548, a contract of insurance on trade with the enemy was held void. A draft drawn by a citizen of one country upon the citizen of a hostile country was held void. *Lacy v. Lugarman*, 12 Heisk. (Tenn.) 354; *Billgerry v. Branch*, 19 Gratt (Va.) 393; *Willison v. Patterson*, 7 Taunt. 439. A purchase of land from an alien enemy is invalid. *Hill v. Baker*, 32 Iowa, 302; 7 Am. Rep. 193, 196, note. A contract to sell lands in Texas, after the declaration of independence, in consideration of money advanced to aid the war of Texas against Mexico, was held void. *Kennett v. Chambers*, 14 How. (U. S.) 38. "The law of nations prohibits all intercourse between the citizens of two belligerents, which is inconsistent with the state of war between their countries, and this includes any act of voluntary submission to the enemy or receiving his protection, as well as any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurance upon trade with or by the enemy." GRAY, J., in *Kershaw v. Kelsey*, 100 Mass. 572; 1 Am. Rep. 142. No action can be maintained on such a contract, to enforce its obligations, or to secure its fruits to either party. *Armstrong v. Toler*, 11 Wheat. 258; *Thomson v. Thomson*, 7 Ves. 470. If the illegal nature of the dealings appears, either in the pleadings or at the trial, the court, of its own motion, will dismiss the case. *Dunham v. Presby*, 120 Mass. 285; *Shortwell v. Ellis*, 42 Miss. 439. A state of war may also incidentally furnish a defense. Thus, it has been held that interest does not run while the collection of a debt is suspended by a state of war. *Hoare v. Allen*, 2 Dall (Penn.), 102; *Bordley v. Eden*, 3 Harr. & M. (Md.) 167; *Brewer v. Hastie*, 3 Call (Va.), 22; *Mayer v. Reed*, 37 Ga. 482. But the rule is not applied in all cases, as we shall see in the next section. An imprisonment of a debtor, by order of a military officer, at a time when only a provisional government existed, had the same effect to discharge bail from liability, for not surrendering his principal, as if made on a regular warrant from the civil courts. *Belding v. State*, 25 Ark. 315; 4 Am. Rep. 26. A commission merchant is relieved of his obligation to account for goods if they are taken from him by the government. *Coleman v. Mollere*, 22 La. Ann. 106. So, in case of other bailees. *Wilkinson v. Williams*, 35 Tex. 181. An alien enemy may have an agent here to collect his debts and preserve his property, and a payment to such agent is a good discharge.

Hale v. Wall, 22 Gratt. (Va.) 424; *Sands v. N. Y. Ins. Co.*, 59 Barb. 556; 51 N. Y. (6 Sick.) 626. It is no objection that the agent may possibly remit the money to his principal, in the enemy's country. If he should do so the offense would be imputable to him and not to the person paying him the money. *Kershaw v. Kelsey*, 100 Mass. 573; 1 Am. Rep. 142; *Conn. v. Penn.*, Pet. C. C. 496; *Ward v. Smith*, 7 Wall. 447; *Buchanan v. Curry*, 19 Johns. 137. In an action upon a promissory note, a plea, that at the time when the note was made, the plaintiff was a citizen of Minnesota, and the defendant a citizen of Arkansas, aiding the rebellion and the public enemies of the United States, is a good defense to the action. *Rice v. Shook*, 27 Ark. 137; 11 Am. Rep. 783. See *Woods v. Wilder*, 43 N. Y. (4 Hand) 164; 3 Am. Rep. 684.

§ 5. **When not a defense.** Where an agreement does not involve or contemplate the transmission of money or property or other communication between the hostile territories it is valid. *Leak v. Richmond Co.*, 64 No. Car. 132. Thus, a lease of land within the hostile lines was held valid, and the payment of the rent enforceable. *Kershaw v. Kelsey*, 100 Mass. 577; 1 Am. Rep. 142. Where it appears that there was no intention to violate the law, but rather to obey it, the contract was held valid. *Shacklett v. Polk*, 51 Miss. 378. But this would hardly be so if the manifest effect of such contract was to aid the enemy. The rigidity of rule prohibiting dealings with the enemy can be relaxed by the sovereign, and the laws of war so far suspended as to permit trade with the enemy. Each State settles its own policy for itself, and determines whether its true interests are better promoted by granting or withholding licenses to trade with the enemy. If so licensed the trade is lawful. *Crawford v. Penn.*, 3 Wash. 484; *United States v. Lane*, 8 Wall. 195. The illegality of the original contract is no defense to actions to enforce subsequent or collateral contracts or rights. Thus, it was held, that an agreement by the consignee of goods, illegally imported from the enemy, in time of war, to pay any sum for which the importer might become liable, if the goods were condemned, was legal. *Armstrong v. Toler*, 11 Wheat. 258. The courts say: "It cannot be questioned that, however strongly the laws may denounce the crime of importing goods from the enemy, in time of war, the act of defending a prosecution instituted in consequence of such illegal importation, is perfectly lawful. Money advanced by a friend in such a case is advanced for a lawful purpose, and a promise to repay it is made on a lawful consideration. The criminal importation constitutes no part of this consideration." A war stops the running of the statute of limitations where the parties are on opposite sides of the boundary

lines. *Hanger v. Abbott*, 6 Wall. 532. The time within which a defendant might redeem real estate from a levy on execution does not run while he is in a hostile State. *Mixer v. Sibley*, 53 Ill. 61. The interest on debts has been held not to cease if the creditor resided here, or has an agent here. *Conn. v. Penn.*, Pet. C. C. 496; *Ward v. Smith*, 7 Wall. 447; *Gates v. Union Bank*, 12 Heisk. (Tenn.) 325. Thus, where the holder of the note was a resident of Virginia and the maker a resident of Iowa, interest was allowed. *Griffith v. Lovell*, 26 Iowa, 226; *Thomas v. Hunter*, 29 Md. 406; *Yeaton v. Berney*, 62 Ill. 61. The rule suspending interest only applies where the money is to be paid directly to a belligerent. *Haggard v. Conkwright*, 7 Bush (Ky.), 16; 3 Am. Rep. 297. Agency is usually terminated by war, so that a payment to an attorney at law, holding a claim for an alien enemy, is no discharge. *Blackwell v. Willard*, 65 No. Car. 555; 6 Am. Rep. 749. So an alien enemy cannot execute a deed by his attorney here. *Filor v. United States*, 3 Ct. of Cl. 25. War does not excuse the performance of a condition precedent, so as to save a forfeiture. *O'Reily v. Mutual Life Ins. Co.*, 2 Abb. Pr. (N. S.) 167. But in *Mutual Ins. Co. v. Hillyard*, 37 N. J. Law, 444, it was held that it being unlawful to remit or to receive an insurance premium where the insurer and the insured were divided by war, its non-payment worked no forfeiture. Where the contract of insurance was made between an insurer in England and a person living in Virginia, it was not suspended by the civil war, though made through an agent in the northern States. *Robinson v. International Ass. So.*, 52 Barb. 450; 42 N. Y. (3 Hand) 54. A disability to sue, in consequence of war, did not suspend a condition in a policy of insurance, forbidding a suit upon it unless begun within one year after loss. *Phoenix Ins. Co. v. Underwood*, 12 Heisk. (Tenn.) 424; *Semmes v. City Ins. Co.*, 6 Blatchf. 445. The defendant in a suit cannot set up that he is an alien enemy. *Dorsey v. Kyle*, 30 Md. 512; *Mixer v. Sibley*, 53 Ill. 61; *Dorsey v. Thompson*, 37 Md. 25. A new promise to pay a debt, voidable as against the policy of war, may be enforced, if made after peace. *Ledoux v. Buhler*, 21 La. Ann. 130. But this would not apply to the case of a contract intended directly to aid the enemy, or directly in violation of military orders. *Dunham v. Presby*, 120 Mass. 285. A military officer cannot make any alienation of public land, but such act may be confirmed by the legislature. *Friedman v. Goodwin*, McAll. 142. A deed made by a citizen in rebellion is valid, except as against the government, on regular proceedings for forfeiture. *Galbraith v. McFarland*, 3 Coldw. (Tenn.) 267. A mortgage sale is good though the mortgagor is within the

Confederate lines, and so unable to redeem. *De Jarnette v. De Giverville*, 56 Mo. 440. Knowledge by the seller of a horse that it was purchased for use in the Confederate service will not vitiate the note given for the purchase-price. *Tedder v. Odom*, 2 Heisk. (Tenn.) 68; 2 Am. Rep. 25.

§ 6. **As a defense for torts.** An act which is a tort may yet not create any liability on the part of the person doing the same, he being protected by the orders of his superior. Where the circumstances are such as to constitute duress, they would be a defense without regard to any military relation between the person ordering and the person performing the acts. *Weatherspoon v. Woodey*, 5 Coldw. (Tenn.) 149. See Duress. Where that relation does not exist, the subordinate officer or soldier is protected in any acts ordered by his superior which are within his apparent lawful authority. *Rutledge v. Fogg*, 3 Coldw. (Tenn.) 554; *Broadway v. Rhem*, 71 No. Car. 195. If it ought to be apparent to any person of common sense that the order is illegal, it is no protection. *Id.*; *Mitchell v. Harmony*, 13 How. (U. S.) 115. In *Sellards v. Zomes*, 5 Bush (Ky.), 90, it was held that the order of a superior officer directing the impressment of property was no justification unless it was also shown that there was an apparent and instant emergency leaving no legal and available alternative. He can only justify the acts required by his orders. Thus one who arrests deserters cannot seize and carry away their property. *Clark v. Cumins*, 47 Ill. 372. See *Allen v. Colby*, 47 N. H. 544. If a court-martial proceed in a case where it clearly has no jurisdiction, the officers who execute its sentence are liable as trespassers. *Wise v. Withers*, 3 Cranch 331; *Smith v. Shaw*, 12 Johns. 257. Neither the right of imprisonment nor to exact contributions belongs to petty officers, but the orders, must come from the commander of a district post or army. *Lewis v. McGuire*, 3 Bush (Ky.), 202. A county provost marshal who, under orders from a district marshal, carries away property, is liable for the act unless an emergency sufficient to justify it is shown. *Jones v. Commonwealth*, 1 Bush (Ky.), 34. An officer who orders an arrest is liable for oppression or undue harshness on the part of his subordinate through his neglect to properly overlook him. *McCall v. McDowell*, 1 Abb. (U. S.) 212. That property was illegally sent across the lines is no justification to an individual who takes it. *Charles v. McCune*, 57 Mo. 166.

CHAPTER XLIII.

MERGER AND HIGHER SECURITY.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition and nature. In many cases a person may acquire an election as to the manner in which he may claim a debt, or as to the title by which he may hold an estate, or the law may allow him to hold two titles, or two forms of debt at once. But in the absence of any evidence to the contrary, the law presumes that he desires to hold only the higher form of security, or title, and all lesser titles or forms of security disappear in that, and are said to be merged or sunk in it. Where a new contract is made between the parties, which covers the same ground as a previous contract, it is presumed that the parties intend that a first contract shall no longer exist, and the same is the rule where an oral contract is reduced to writing, or a deed takes the place of a written contract. There arise then two questions, under what circumstances does the question of merger arise, and according to what principles is it applied. The instances given in the following sections will illustrate the first question. The second question is determined by the interest and intention of the parties and the substantial justice of the case. The interest and intention of the parties is in many cases determined as a presumption of law. Thus where an oral contract is put in writing, the presumption is conclusive that it is intended to extinguish the oral contract. In other cases it may be for the jury. But where there are no explanatory facts, the court will determine the question. Thus where the rights of third parties have intervened between the first contract or title and the second, the courts will not presume an intent to merge. Where a mortgagee buys the equity of redemption he will still hold his rights as mortgagee as against any second mortgagee or attaching creditor. In States where the separation between common law and equity still exists, a merger will take place in many instances at law where equity will treat the rights as still independently existing. Thus besides the familiar cases of legal and

equitable titles, in the case of the merger of a note in a judgment, equity will still recognize the relation of principal and surety as existing between the judgment debtors, although that relation is merged at law. A distinction is also made to turn upon the manner in which the two rights became united. If it happened by act of the law as by descent without any intent or act of the parties, the presumption of merger is much less strong than if it is accomplished by a contract, for the maxim that a person must be presumed to intend the natural consequences of his acts comes in. The change in the legal relation of the parties caused by the merger is of course a defense to any action or claim founded on the contract or title which has been extinguished. On the other hand, if no merger has taken place, the first contract will still be a sufficient protection and defense for acts done under it, and may be enforced between the parties.

§ 2. **What is a good defense.** Any rights which depend for their support on the estate or right merged will fail with it. Thus where a mortgage has come into the possession of the holder of the equity of redemption and so has merged, the owner of the land can resist any attempt on the part of a subsequent assignee of such mortgage to enforce it. So where rents are pledged to a surety and he afterward buys the land, there is a merger and the rents cannot be revived and enforced for the benefit of the grantor. *Rankin v. Wilsey*, 17 Iowa, 463. Where land was at different times mortgaged to secure two notes, and was afterward sold on decree to satisfy the first note, and purchased by an assignee of a mortgage expressly made subject to the second note, there is a merger and he cannot collect the second note of the mortgagor. *Weiner v. Heintz*, 17 Ill. 259. Where the holder of a first and second mortgage foreclosed the second, the first is merged and satisfied, and the mortgagor is no longer liable on the note. *Bassett v. Mason*, 18 Conn. 131. A debt secured by mortgage on chattels cannot be enforced after a suit, judgment and levy on the mortgaged property. *Butler v. Miller*, 1 Den. 407. The purchase of the equity of redemption at a sheriff's sale by the mortgagee extinguishes the mortgage debt to the extent of the value of the premises after deducting the sum paid for such equity. *Murphy v. Elliott*, 6 Blackf. (Ind.) 482. A foreclosure of the mortgage pays the mortgage notes at least to the value of the estate. *Hurd v. Coleman*, 42 Me. 182. Where a guardian leased land of his ward and before the first installment of rent became due, the ward having come of age, conveyed the land to the tenants, the two estates merge and the tenant cannot be compelled to pay any rent. *Mixon v. Coffield*, 2 Ired. (No. Car.) 301. Where premises were conveyed by the mortgagor to the mortgagee, but the conveyance

was voidable as in fraud of creditors and was set aside, there is no merger and the mortgagee may defend any rights acquired under the mortgage. *Ladd v. Wiggin*, 35 N. H. 421. So if the title of a purchaser of land failed, he can still claim a ground rent which he owned before the purchase. *Wilson v. Gibbs*, 28 Penn. St. 151. Where a vendee of land took an assignment of a judgment affecting the property, he stands on his rights as vendee, as to third persons, and the rights merge. *Strout v. Natoma Co.*, 9 Cal. 78. In cases of contracts the rights of the parties may be altered by a merger in higher security. *Van Vliet v. Jones*, 1 Spencer (N. J.), 340; *Gardner v. Hust*, 2 Rich. (So. Car.) 601; *Vaughn v. Lynn*, 9 Mo. 770. Thus, articles of agreement for the purchase of land are merged in the deed and will no longer support an action. *Haggerty v. Fagan*, 2 Pen. & W. 533; *Cronister v. Cronister*, 1 W. & S. (Penn.) 442. It makes no difference that the contract has been partly executed. *Worthington v. Bullitt*, 6 Md. 172. Thus a parol agreement by a vendor to procure an outstanding title is merged in the covenants in the deed, when given. *Coleman v. Hart*, 25 Ind. 256. So where at a sale of personal property a bill of sale is given, evidence that at the time the seller agreed to take them back is inadmissible. *Fales v. McKeon*, 2 Hilt. 53. Collateral parol promises made at the time of executing a deed are merged in the warranty. *Share v. Anderson*, 7 S. & R. (Penn.) 43. A former contract is merged in a new one of the same extent and higher in its nature and also in one of less extent so far as it does extend, unless it is proved that such was not the intention. *Smith v. Higbee*, 12 Vt. 113; *Davidson v. Kelly*, 1 Md. 492; *Hargrave v. Conroy*, 19 N. J. Eq. (4 C. E. Green) 281.

A bond given for a simple contract debt by one of the parties to it extinguishes it and releases the others. *Settle v. Davidson*, 7 Mo. 604. Accepting a bond from one partner, on obtaining a judgment against him for a firm debt, extinguishes the claim against the firm, though the other partner is dormant. *Anderson v. Lean*, 1 W. & S. 334. So a bond given by one in whose name the business is carried on extinguishes the liability of a dormant partner. *Ward v. Motter*, 2 Robinson (Va.), 536. A bond from one co-tenant for the whole rent discharges the other tenants from liability. *Howell v. Webb*, 2 Pike (Ark.), 360. The acceptance of the personal bond of an executor by a legatee extinguishes the legacy. *Stewart's Appeal*, 3 W. & S. (Penn.) 476. To create a merger the higher security must be taken in satisfaction and not as collateral. *Stamper v. Johnson*, 3 Tex. 1. The contracts must be co-extensive and between the same parties. *Boaler v. Mayor*, 19 C. B. (N. S.) 76. A verbal agreement is merged in a written one on

the same subject. *Stine v. Sherk*, 1 W. & S. (Penn.) 195. Thus where two persons join in signing a note, the note becomes the evidence of the contract and is a merger of a previous agreement for a loan to one. *Miller v. Miller*, 4 Penn. St. 317. A bank check is a written contract, and all negotiations between the drawer and the drawee with respect to the liabilities of the parties thereto are deemed to be merged in the check. *American Emigrant Co. v. Clark*, 47 Iowa, 671. Conversations and stipulations had before and at the time are merged in the writing. *Rogers v. Atkinson*, 1 Kelly (Ga.), 12. Where the note of one partner is taken for a firm debt, merger is a question of intention. *Davis v. Desauque*, 5 Whart. (Penn.) 530. Where a debt due to a firm has been assigned to one partner a note to him extinguishes the debt. *Lamkin v. Phillips*, 9 Port. (Ala.) 98. Where a new note is discounted and the proceeds used to take up the old one, it is extinguished though the indorser on the new note expressly stipulated that it should remain in force. *Hill v. Bostick*, 10 Yerg. (Tenn.) 410. A novation extinguishes the old contract. *Heaton v. Angier*, 7 N. H. 397. The note of a third person and the residue in cash received by the creditor satisfies the debt. *Frisbie v. Larned*, 21 Wend. 450. If a subsequent contract includes and goes beyond the terms of the first, the first is superseded. *Munford v. Wilson*, 15 Mo. 540. A letter written during negotiations is merged in a charter-party subsequently executed. *Renard v. Sampson*, 12 N. Y. (2 Kern.) 561. A prior contract is merged in a later one on the same subject for the latter as the last act of the parties must be presumed to contain and express their true meaning and intention. *Stow v. Russell*, 36 Ill. 18. A judgment merges a previous contract. *Curtis v. Vermont Central Railroad*, 23 Vt. 614; *West Feliciana Railroad v. Thornton*, 12 La. Ann. 736. A judgment on a note given by one partner merges the original debt. *McMaster v. Vernon*, 3 Duer, 249; *Frisbie v. Larned*, 21 Wend. 450; *Nichols v. Burton*, 5 Bush (Ky.), 320. A judgment against the ostensible partner merges any claim against a dormant partner. *Moale v. Hollins*, 11 Gill & J. (Md.) 11. A judgment against one on a joint contract merges the contract and releases the others. *Woodworth v. Spaffords*, 2 McL. (U. S.) 168; *Nicklaus v. Roach*, 3 Ind. 78; *Bonested v. Todd*, 9 Mich. 371; *Archer v. Heiman*, 21 Ind. 29. In some States it is held that a judgment on a note against a principal and surety merges the note and excludes at law any defense arising out of that relation. *Marshall v. Aiken*, 25 Vt. 328; *Contra: Rice v. Morton*, 19 Mo. 263. See *Principal and Surety*. The merger of a debt in a judgment merges all its peculiar qualities. *Temple v. Scott*, 3 Minn. 419. A new judgment recovered on an old one merges it and lets in all

subsequent rights. *Denegre v. Haun*, 13 Iowa, 240. Where there are suits on the same subject in different States judgment in one merges the contract and becomes a defense to the other. *Barnes v. Gibbs*, 31. N. J. Law (2 Vroom), 317. Where there is an election between two who are liable on the same debt, a judgment against one discharges the other. *Gray v. Palmer*, 2 Rob. (N. Y.) 500. An award merges the original demand. *Varney v. Brewster*, 14 N. H. 49.

§ 3. **What is not a defense.** The rule has always prevailed in equity, and generally at common law, that a merger of titles will not take place if it is against either the intent or the interest of the parties or against substantial justice. *Edgerton v. Young*, 43 Ill. 464; *Lyon v. Melvaine*, 24 Iowa, 9; *Finch v. Houghton*, 19 Wis. 149; *Duncan v. Smith*, 31 N. J. Law (2 Vroom), 325. The intention of the parties is the controlling consideration where it has been made known or can be inferred from their acts or conduct. *Campbell v. Carter*, 14 Ill. 286. The union of the legal and the equitable title in land mortgaged will not be a merger which will prevent the mortgagee from maintaining ejectment on the mortgage against the mortgagor. *Den v. Van Ness*, 5 Halst. (N. J.) 102. The question in some cases depends upon the state of the record. If at the time of a deed to a mortgagee from the owner of the equity the mortgagee had sold the note to a third person, even a purchaser from the mortgagee is bound to know that there has been no merger. *Edgerton v. Lyon*, 43 Ill. 464. But in *McQuigg v. Morton*, 39 Penn. St. 31, it is said that if the conveyances of which a purchaser is bound to take notice do not show a merger there is none as to him. A simple contract debt of three is not merged in a mortgage given by two of them and the third is not discharged. *Sharpe v. Gibbs*, 16 C. B. (N. S.) 527. A simple contract debt due from a partnership is not merged in a higher security given by one partner. *Nicholson v. Leavitt*, 4 Sandf. 252; *Fleming v. Lawhorn*, Dud. (So. Car.) 360; *Bond v. Aitken*, 6 W. & S. (Penn.) 165. A sealed note, given by one partner in the firm name without authority, does not merge the debt. *Broze v. Poyntz*, 3 B. Monr. (Ky.) 178; *Horton v. Child*, 4 Dew. (No. Car.) 460. A note given by a surviving partner does not merge the firm debt. *Mebane v. Spencer*, 6 Ired. (No. Car.) L. 423. Where A and B as a firm owed C and, on dissolution, B agreed to pay the debts, and he afterward formed a new partnership with C, this does not extinguish the debt. *Mitchell v. Dobson*, 7 Ired. (No. Car.) Eq. 34. A bond given by one of several joint debtors does not merge the debt unless given at the same time or accepted in discharge. *Maddin v. Edmondson*, 10 Mo. 643. A bond with sureties given by an indorser to a bank, where he has discounted the note, does not merge it. *Taylor v. Bank of Alex-*

andria, 5 Leigh (Va.), 471. A provision in an agreement of sale that the vendor shall satisfy a mortgage, is not merged in the deed. *Bennett v. Abrams*, 41 Barb. 619; *Selden v. Williams*, 9 Watts (Penn.), 9. See cases to the contrary in § 2, *ante*, p. 321. Where the agreement contains separate provisions, a deed in execution of part does not merge the rest. *Witbeck v. Waine*, 16 N. Y. 532; *Daughtry v. Boothe*, 4 Jones (No. Car.) L. 87. A guaranty of title is not merged in a subsequent conveyance which contains only a special warranty. *Drinker v. Byers*, 2 Penr. & W. 528. A warranty of soundness, given long after the sale and after a breach of a parol warranty, does not take away the right of action for such breach. *Cameron v. Ottinger*, 1 Head (Tenn.), 27. Where the higher security is given by different parties, or is for a different sum, the presumption is that no merger is intended. *Jones v. Johnson*, 3 W. & S. (Penn.) 276. An agreement under seal does not merge the debt if it is given and accepted as collateral only. *Charles v. Scott*, 1 S. & R. (Penn.) 294. One simple contract does not ordinarily merge another. *Wylly v. Collins*, 9 Ga. 223. Acceptance of security of equal degree does not merge the debt, unless it is received in satisfaction, and this question is ordinarily for the jury (*Yates v. Donaldson*, 5 Md. 389), and a merger will not be implied merely from the acceptance of new security offered by the other side. *Potter v. McCoy*, 26 Penn. St. 458. A subsequent parol contract on no new consideration is no discharge of a previous written one, unless the former has been executed. *Hunt v. Barfield*, 19 Ala. 117; *Coe v. Hobby*, 72 N. Y. (27 Sick.) 141. Where the particulars of a settlement are committed to writing, it does not extinguish a bond given as part of the settlement. *Eby v. Eby*, 5 Penn. St. 435. A note does not merge the debt unless so agreed, and does destroy a mechanic's lien, even if he has transferred the note. *Steamboat Charlotte v. Kingsland*, 9 Mo. 67. A written instrument merely recognizing a debt, providing the manner of its payment and adjusting the balance, is not a merger of the debt. *Smith v. Morrison*, 3 A. K. Marsh. (Ky.) 81. A merger extends only to that part of the accounts of the parties which is settled by them. *Id.* While, as a usual rule, a debt from one appointed executor to the estate is merged, this will not be so if a contrary intent appears. *Finch v. Houghton*, 19 Wis. 149.

A judgment on a note secured by a trust deed of land does not operate as a release of the security, nor prevent a sale of the land to satisfy the judgment. *Hamilton v. Quimby*, 46 Ill. 90. A judgment on a note, signed by a firm and by an individual, against the individual, does not bar a suit against the firm. *Gilman v. Foote*, 22 Iowa, 560; *Hawks v. Hinchliff*, 17 Barb. 492. So, a judgment against two of

three joint debtors does not bar a suit against the third. *Phillips v. Fitzpatrick*, 34 Mo. 276. If the contract is joint and several, this is uniformly so held. *Harlan v. Berry*, 4 Green (Iowa), 212; *Reed v. Girty*, 6 Bosw. 567; *Sawyer v. White*, 19 Vt. 40; *Bangs v. Strong*, 4 Comst. (N. Y.) 315. A second judgment for alimony upon a second divorce of parties, who have remarried after the first, does not merge the first judgment. *Brenner v. Brenner*, 48 Ind. 262. But would not the remarriage itself terminate or suspend such right to alimony? Contrary to the cases cited in § 2, *ante*, p. 321, it has been held that judgment on a note, signed by a principal and surety, does not merge that relation (*Rice v. Morton*, 19 Mo. 263), and that if the surety pays the judgment and takes back the note, he may transfer it to another. *Kelsey v. Bradbury*, 21 Barb. 531. A fine imposed upon a sheriff for neglect to enforce a judgment does not operate *per se* to extinguish the debt, although it is paid to the creditor. *Carpenter v. Stilwell*, 12 Barb. 128. A judgment confessed by a third person on a simple contract debt is no merger (*Wolf v. Wyeth*, 11 S. & R. 149), nor is a judgment on notes or securities, held as collateral, a merger of the principal debt. *Hawks v. Hinchliff*, 17 Barb. 492; *Drake v. Mitchell*, 3 East, 251.

§ 4. **How interposed.** If the suit is brought upon a contract which has been merged in some other security or in a judgment, the answer should set out the facts. As the contract once existed, and has since ceased to be in force, a general denial will not be sufficient, but the answer must be in confession and avoidance, unless the case took such a form that the defendant could invoke the rules as to secondary evidence and thus prevent the plaintiff from proving any case. If the question arises out of court upon some attempt to enforce rights growing out of the merged contract, it may be treated as a nullity, or in a proper case the aid of a court of equity may be invoked to enjoin the assertion of rights under it. Thus if one claiming to be the holder of a mortgage which had in reality been merged should attempt to foreclose it, the owner of the land might treat the proceedings as a nullity, and protect himself against them as he would against any other unfounded claim, or he might ask a court of equity to interfere and protect him from the cloud on his title.

CHAPTER XLIV.

MISTAKE.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. In general. Courts of equity will relieve against a mistake where it is clearly proved, whether it be at the instance of a complainant or a defendant. *Hendrickson v. Ivins*, Saxton, 562; *Schettiger v. Hopple*, 3 Grant (Penn.), 54; *Dismukes v. Terry*, Walker (Miss.), 197. It will reform an instrument which, by reason of a mistake, fails to execute the intention of the parties, as well upon an equitable defense set up in an answer, as in a suit brought directly for that purpose. *Hook v. Craighead*, 32 Mo. 405; *Smith v. Allen*, Saxton, 43; *Gillespie v. Moon*, 2 Johns. Ch. 585. But a party praying for the correction of a mistake, must offer to do all in his power to correct it. *Boyce v. Watson*, 20 Ga. 517. And see *Grymes v. Sanders*, 93 U. S. (3 Otto) 55. Moreover, he must, upon the discovery of the mistake, at once announce his purpose to rescind, and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be as conclusively bound by the contract as if the mistake or fraud had not occurred. *Id.* And see *Thomas v. Bartow*, 48 N. Y. (3 Sick.) 193.

It is a well-established rule in all cases, when a writing is sought to be reformed, that the evidence of the mistake shall be clear and satisfactory, leaving but little, if any doubt of the mistake. *Miner v. Hess*, 47 Ill. 170; *Burgin v. Giberson*, 26 N. J. Eq. 72; *Heavenridge v. Mondy*, 49 Ind. 434; *State of Missouri v. Frank*, 51 Mo. 98.

Parties to an agreement may be mistaken as to some material fact connected therewith, which formed the consideration or inducement, on the one side or the other; or they may simply make a mistake in reducing their agreement to writing. In the former case before the agreement can be reformed it must be shown that the mistake is one of fact, and mutual, in the latter case it may be a mistake of the draftsman, or of one party only, and it may be a mistake of law or of fact. Equity interferes, in such a case, to compel the parties to execute the

agreement which they have actually made. *Pitcher v. Hennessey*, 48 N. Y. (3 Sick.) 415. And see *Van Donge v. Van Donge*, 23 Mich. 321; *Robertson v. Walker*, 51 Ala. 484.

As a general rule, a court of equity will only interfere to correct a mistake in a written instrument, when it has been mutual, and does not embody the terms, as fully understood by both parties. But this rule does not prevail, either where the party against whom the relief is sought has acted in bad faith or disingenuously, with full apprehension that the instrument did not express what the other party desired or intended, or where confidence was reposed in him, and he was intrusted with, and assumed the preparation of the instrument, but has, in its preparation, either willfully or negligently omitted what had been clearly stated to him as the intention of the other party, who, relying on its correctness, and without particular examination of the document so prepared, incautiously assents to it, under the supposition that it conforms to the verbal terms of the negotiation, as previously agreed upon. *Brioso v. Pacific Mutual Ins. Co.*, 4 Daly (N. Y.), 246. And see *Hardigree v. Mitchum*, 51 Ala. 151; *Thurmond v. Clark*, 47 Ga. 500. Although relief from the consequences of an agreement formed upon a misapprehension of the law will not, for that reason, alone, be granted, yet, if a deed or instrument is executed to carry out an agreement, and, by reason of misapprehension of its legal effect, fails to effectuate or to conform to the agreement, a court of equity will relieve. *Sparks v. Pittman*, 51 Miss. 511. And see *Pitcher v. Hennessey*, 48 N. Y. (3 Sick.) 415; *O'Donnell v. Harmon*, 3 Daly (N. Y.), 424. Relief will not be afforded in equity on the ground of mistake, where the liability is the result of pure carelessness. *Voorhis v. Murphy*, 26 N. J. Eq. 434.

If one of the parties to a deed, intended and understood, by both, to conform to a previous contract, but which fails so to do, delays, honestly and reasonably relying upon their original construction of the deed, to bring suit to reform it, for several years after notice that the other party denies that construction, the delay is not imputable as laches, in defense against the suit. *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290. See, too, *Monroe v. Skelton*, 36 Ind. 302; *Kearney v. Sascor*, 37 Md. 264.

An erroneous opinion, common to both parties, as to the value of a partnership interest, is not such a mistake of fact as will warrant a rescission in equity, of the sale of such interest. *Dortic v. Dugas*, 55 Ga. 484; *Ludington v. Ford*, 33 Mich. 123.

See *ante*, pp. 135-207, Vol. 3, chap. 61 — "Equity," and "Reformation of Instruments," *ante*, pp. 437-453, Vol. 5, chap. 116.

§ 2. **When a defense.** If an agreement for the sale of land, by mistake, is not in accordance with the intention of the parties, a court of equity will not, by the aid of parol evidence, reform the agreement, and then decree the execution of it as reformed. But where the mistake is set up by way of defense against a claim for the specific execution of the agreement, parol evidence is admissible to establish such defense. *Osborn v. Phelps*, 19 Conn. 63. Greater latitude will be allowed the defendant in resisting a bill for a specific performance of a contract, than to the plaintiff in making out his case. *Id.*; *Casey v. Holmes*, 10 Ala. 776; *ante*, Vol. 5, p. 822. On such bill the defendant may generally show, in defense, that the written contract does not state correctly the agreement of the parties, by reason of some omission, insertion or variation, through mistake, surprise or fraud. *Clinan v. Cooke*, 1 Sch. & Lef. 38; *Honeyman v. Marryatt*, 6 H. L. Cas. 111; *Lee v. Kirby*, 104 Mass. 427. But a mistake of law cannot be set up as a ground for resisting specific performance. *Marshall v. Collett*, 1 Y. & Coll. (Exch.) 232; *Cooper v. Phibbs*, L. R., 2 E. & Ir. App. 149, 170; *Midland Great Western Railway of Ireland Co. v. Johnson*, 4 Jur. (N. S.) 643; 6 H. L. Cas. 798. But where the heir-at-law of a shareholder in a company, the shares in which were personal estate, being ignorant of that circumstance, and supposing himself to be liable in respect of the ancestor's shares, executed a deed of indemnity to the trustees of the company, it was held that he was entitled, in equity, to have his execution of the deed canceled, as having been obtained under a mistake of fact and law. *Broughton v. Hutt*, 3 DeG. & J. 501.

As to the circumstances surrounding mistakes, such as have been allowed in defenses to actions at law, see *Vorley v. Barrett*, 1 C. B. (N. S.) 225; 26 L. J. C. P. 1; *Wake v. Harrop*, 6 H. & N. 768; 7 Jur. (N. S.) 710; 30 L. J. Exch. 273; 9 W. R. 788; 4 L. T. (N. S.) 555; S. C. affirmed, on appeal, 1 H. & C. 202; 31 L. J. Exch. 451; *Steele v. Haddock*, 10 Exch. 643; 24 L. J. Exch. 78; *Luce v. Izod*, 1 H. & N. 245; 25 L. J. Exch. 307.

§ 3. **When not a defense.** Mistake, to be a defense, must be so alleged that upon the facts stated a court of equity would have granted a simple relief, in favor of the defendant. It is allowed as a defense at law, on the principle of avoiding circuity of action.

When the mistake has not been allowed as a defense, see *Scott v. Littledale*, 8 El. & Bl. 815; 4 Jur. (N. S.) 849; 27 L. J. Q. B. 201; *Minshull v. Oakes*, 2 H. & N. 793; 27 L. J. Exch. 194; *Perez v. Oleaga*, 11 Exch. 506; 25 L. J. Exch. 65; *Solvency, etc., Co. v. Freeman*, 7 H. & N. 17; 31 L. J. Exch. 197.

One who enters into a contract to sell a piece of land, under a mistake as to the quantity contained therein, is not thereby excused from performance where it appears that such mistake had no influence on the price for which he offered to sell the land. *Davis v. Parker*, 14 Allen (Mass.), 94.

Performance of a contract for the sale of lands may, in some cases, be excused or modified by a mistake, on the part of the vendor, as to facts, or the contents of the contract. But a mistake as to the legal effect of the contract is not a good defense to a suit for performance, and will not relieve the vendor from the obligation to perform the contract, according to the legal effect thereof, unless he has been misled by the fault of the other party. *Zane v. Cawley*, 21 N. J. Eq. 130. Specific performance of a contract for the sale of lands will not be decreed in cases of fraud or mistake, or of hard and unconscionable bargains, or where the decree would produce injustice, or would be inequitable under all the circumstances. *Margraf v. Muir*, 57 N. Y. (12 Sick.) 155. See *Weise's Appeal*, 72 Penn. St. 351.

When the answer to a bill for specific performance of a parol contract sets up, and the evidence sustains a different contract from that stated in the bill, the court should not, as a general rule, dismiss the bill, even at the instance of the plaintiff, but should decree specific performance of the contract as proved, when such a course will work no hardship or injustice to either of the parties. *McComas v. Easley*, 21 Gratt. (Va.) 23.

CHAPTER XLV.

MITIGATION.

ARTICLE I.

GENERAL RULES.

Section 1. Definition. Mitigation is a reduction, a diminution, a lessening of the amount of a penalty or punishment.

Circumstances which do not amount to a justification or excuse of the act committed may yet be properly considered in mitigation of the punishment. And in actions for the recovery of damages, matters may often be given in evidence in mitigation of damages, which are no answer to the action itself. 2 Bouv. Law Dict., p. 189, title, Mitigation.

§ 2. **What may be shown in mitigation.** In an action for slander the defendant may set up, in mitigation of damages, that he spoke the words in a moment of heat and passion, induced by immediate preceding acts of the plaintiff. And all the immediate circumstances under which the slanderous words were spoken may be shown, where it is alleged they were spoken in heat of passion. *Jauch v. Jauch*, 50 Ind. 135; 19 Am. Rep. 699; *Flagg v. Roberts*, 67 Ill. 485; *Miles v. Harrington*, 8 Kans. 425; *Tarpley v. Blaby*, 7 C. & P. 395; S. C., *nom.*, *Tarpley v. Blabey*, 2 Bing. N. C. 437; 2 Scott, 642; Hodges, 414. So, where it appeared that the defendant spoke the slanderous words immediately after a conversation between the plaintiff, and a witness to whom the words were spoken, it was held, that if the defendant heard such conversation, and there was any thing in it of an insulting character toward him, or tending to excite his anger, he had a right to show it in mitigation of damages. *Ranger v. Goodrich*, 17 Wis. 78. But it is not enough that the words were spoken in heat of passion. It must also appear that there was provocation, caused by the person of whom the words were spoken. *Jauch v. Jauch*, 50 Ind. 135; 19 Am. Rep. 699; *McClintock v. Crick*, 4 Iowa, 453. In an action for libel the defendant may show, in mitigation, that he was provoked to issue the libel by publications of the plaintiff, reflecting on the defendant. *Watts v. Fraser*, 7 A. & E. 223; 1 M. & Rob. 449; 7 C. & P. 369; *Moore v. Oastler*, 1 M.

& Rob. 451. But general evidence that the plaintiff has been in the habit of libeling the defendant is inadmissible. *Wakley v. Johnson*, R. & M. 422; *Finnerty v. Tipper*, 2 Camp. 76. It must be shown, with precision, that the libels by the plaintiff are of given date, and relate to the libels by the defendant. *Tarpley v. Blaby*, 7 C. & P. 395; S. C., *nom.*, *Tarpley v. Blabey*, 2 Bing. N. C. 437; 2 Scott, 642; Hodges, 414. So, too, it is well established that in an action for assault and battery the defendant cannot show, in mitigation of damages, any provocation not happening at the time of the assault, yet where the provocation is alleged to have been a combined attack, in which the plaintiff took part as a confederate, evidence of his participation in previous threats and attacks may be admitted. *Tyson v. Booth*, 100 Mass. 258.

Any circumstances tending to disprove malice are admissible in an action for slander, in mitigation of damages. *Weaver v. Hendrick*, 30 Mo. (9 Jones) 502; *Gilman v. Lowell*, 8 Wend. 573. It may be shown that through the fault of the plaintiff, the defendant, at the time of speaking the words, had good cause to believe they were true. *Larned v. Buffinton*, 3 Mass. 546. So, where the slanderous words were spoken against the chastity of the plaintiff's wife, it is competent for the defendant, under the general issue, in mitigation, to prove that the wife and an unmarried man had lived together alone in one house where a knowledge of such mode of living had come to the defendant before the speaking of the words. *Reynolds v. Tucker*, 6 Ohio St. 516. And the defendant may show, to disprove malice and mitigate damages, that when the words were spoken his mind was so besotted by a long course of dissipation and his character so depraved that no one who knew him would pay any attention to what he might utter, or give any credence to a slanderous charge he might make. *Gates v. Meredith*, 7 Ind. 440. Evidence of declarations by the plaintiff that he was not injured by the slanderous words is admissible in mitigation. *Richardson v. Barker*, 7 id. 567. So, too, is evidence that the party uttering the words offered an explanation of the same, the explanation being part of the same conversation and in the hearing of the same persons, and in reference to the same subject. *Winchell v. Strong*, 17 Ill. 597. And the defendant may show that before the words were spoken some statements which another had made in reference to the same offense had been communicated to him. *Galloway v. Courtney*, 10 Rich. Law (So. Car.), 414. But if the defendant would avail himself of the fact that, at the time he told the injurious story, he mentioned the name of the author, it must not only appear that he did so mention his author, but the *onus* is thrown upon

him to show by proof that he did so receive the story. *Rice v. Cottrell*, 5 R. I. 340.

A statement made by a physician that an unmarried female patient is pregnant is not a privileged communication, unless it is made in good faith to one who is reasonably entitled to receive the information, and when made to others and the statement is false, he is not relieved from liability to the injured party, merely because on examination of the patient he believed it to be true. Such belief, however, may be considered in mitigation of damages. *Alpin v. Morton*, 21 Ohio St. 536.

Evidence of the plaintiff's bad character is admissible and is not restricted to those traits of character which were the subject of the slanderous words. *Sayre v. Sayre*, 25 N. J. Law, 235; *Wright v. Schroeder*, 2 Curtis (C. C.), 548; *Moyer v. Moyer*, 49 Penn. St. 210; *Fletcher v. Burroughs*, 10 Iowa (2 With.), 557. And see *Adams v. Smith*, 58 Ill. 417. But it seems there must be a plea of justification before the plaintiff's previous bad character can be shown in mitigation. *Bracegirdle v. Bailey*, 1 F. & F. 536; *M'Nutt v. Young*, 8 Leigh, 542.

See chapter on *Slander*, ante, Vol. V, pp. 759, 760.

Evidence in mitigation of a libel or slander must be such as admits the charge to be false. *Cooper v. Barber*, 24 Wend. 105; *Abshire v. Cline*, 3 Ind. 115; *Knobell v. Fuller*, Peake's Add. Cas. 139; *Vessey v. Pike*, 3 C. & P. 512. But see *Underwood v. Parkes*, Stra. 1200; *Mullett v. Hulton*, 4 Esp. 248.

By the New York Code evidence tending to prove the truth of the words spoken is admissible when the defendant pleads, as he may, both justification and mitigating circumstances. *Bisbey v. Shaw*, 12 N. Y. (2 Kern.) 67; *Stanley v. Webb*, 21 Barb. (N. Y.) 148. And see *West v. Walker*, 2 Swan (Tenn.), 32; *Duncan v. Brown*, 15 B. Monr. (Ky.) 186.

In an action for libel or slander the defendant may prove, in mitigation of damages, that when the words were uttered or published a general report existed that the plaintiff had committed the act charged. *Wetherbee v. Marsh*, 20 N. H. 561; *Van Derveer v. Sutphin*, 5 Ohio (N. S.), 293; *Bridgman v. Hopkins*, 34 Vt. (5 Shaw) 532; *Shilling v. Carson*, 27 Md. 175; *Springstein v. Field*, Anthon, 252. But see *Waithman v. Weever*, 11 Price 257, *n.* So, a defendant may show, in mitigation of damages, that he heard the libelous statement from a third person. *Duncombe v. Daniell*, 8 C. & P. 222; 2 Jur. 32. And where a libelous letter refers to a newspaper as containing the slanderous matters imputed to the plaintiff, the defendant may give the newspaper in evidence in mitigation of damages. *Mullett v. Hulton*, 4 Esp. 248. But the fact that the libel was published on the communication of a cor-

respondent is not admissible in mitigation. *Talbutt v. Clark*, 2 M. & Rob. 312. And if the libelous matter be stated positively in the publication, and not as resting in rumor merely, the mere existence of the rumor, known to all parties, is not admissible in mitigation of damages. *Haskins v. Lumsden*, 10 Wis. 359.

The publication of a retraction of a libelous article may be considered in mitigation of damages. *Cass v. New Orleans Times*, 27 La. Ann. 214. But a retraction of a slander, in the presence of the defendant's family, is not admissible in mitigation of damages. *Kent v. Bonzey*, 38 Me. (3 Heath) 435.

If a publication is libelous and not privileged, the law implies that it was malicious, and the absence of malice cannot be shown as a bar to the action, yet the defendant may plead and prove the circumstances under which the publication was made, and the motive which induced it, to reduce the amount of damages. *Lick v. Owen*, 47 Cal. 252; *Carpenter v. Bailey*, 53 N. H. 590. And see *ante*, Vol. 4, p. 312.

In an action for criminal conversation, the statements of the wife, prior to the alleged seduction, concerning her husband's cruel treatment of her, are admissible in evidence in mitigation of damages. *Palmer v. Crook*, 7 Gray (Mass.), 418.

In cases where it is competent for the plaintiff to prove the wealth of the defendant, to increase the damages, it is equally competent for the defendant to show a want of it, to diminish them. Nor can he be deprived of this right by the omission of the plaintiff to offer any proof on that point, or to make any claim for damages on that ground. *Johnson v. Smith*, 64 Me. 553; *Karney v. Paisley*, 13 Iowa (5 With.), 89; *Fry v. Bennett*, 4 Duer (N. Y.), 247; S. C. affirmed, 28 N. Y. (1 Tiff.) 324. But in an action on the case for criminal conversation with the plaintiff's wife, tried several years after the alleged injury, proof of the plaintiff's bankruptcy at the time of the trial is inadmissible on the amount of exemplary damages proper to be recovered. *Peters v. Lake*, 66 Ill. 206; 16 Am. Rep. 593.

Where one receives his property again, which had been unlawfully taken from him, he is considered as having received it in mitigation of damages, upon the principle that he has thereby received a partial compensation for the injury suffered. *Merrill v. How*, 24 Me. 126; *Dailey v. Crowley*, 5 Lans. (N. Y.) 301. But in such case he cannot be required to deduct from the amount of the injury suffered beyond the benefit received; and when he has honestly and in good faith paid a sum of money to regain his property, that sum is first to be deducted from the value of the property received back. *Merrill v. How*, 24 Me. 126. Where the holder of a promissory note commenced an

action against a surety therein, the principal having previously assigned his property to the holder for the benefit of his creditors, and while the action was pending a dividend was received under the assignment, the amount of the dividend should be deducted in estimating the damages. *Lincoln v. Bassett*, 23 Pick. 154.

In an action of trespass, evidence of a sum received by the plaintiff in consideration of the release of a co-trespasser, which did not discharge the defendant, is admissible in mitigation of damages. *Bloss v. Plymale*, 3 W. Va. 393. And where property taken by a trespasser has been subsequently levied upon and sold under process in his favor, or in that of a stranger, against the owner, evidence of the fact is admissible in mitigation of damages. *Bates v. Courtwright*, 36 Ill. 518; Vol. 6, pp. 113, 114; *id.*, pp. 223, 224.

If the purchaser of a chattel gives his note for the price, he may avail himself of a partial failure of consideration, or of deception in the quality or value of the chattel, or of a breach of warranty, to reduce the damages in an action brought by the vendor upon such note. *Perley v. Balch*, 23 Pick. 283. And where contractors built a wall under a contract that it should last ten years, and the wall was destroyed within the time, in an action for a breach of the contract against the contractors, it may be shown in mitigation of damages that the price for building the wall had not been fully paid. *Ready v. Tus-kaloosa*, 6 Ala. 327.

In a suit where exemplary damages are claimed, the defendant may prove as a mitigating fact that he acted in good faith, under the advice of counsel. *Bohm v. Dunphy*, 1 Mon. T. 333; *Stone v. Swift*, 4 Pick. 389; *Blunt v. Little*, 3 Mas. (C. C.) 102.

After judgment by default in a suit upon a lease, the tenant may, on an inquiry of damages, to diminish them, show that the title of the lessor was divested or defeated. *Barclay v. Picker*, 38 Mo. 143. And in an action to recover a portion of a mining claim, and damages for wrongfully removing the gold therefrom, evidence is admissible on the part of the defendant, by way of lessening the amount recoverable, of the expense of digging the gold-bearing earth from the claim. *Goller v. Fett*, 30 Cal. 481.

Where an employee is wrongfully discharged he is entitled to recover compensatory damages, which may be mitigated if he gets, or can get, employment in business of the same general character to the extent of the compensation received, if less than his wages under the contract, and, if equal thereto, then only nominal damages. If he engages in business of a different character, requiring harder labor and more capital, the damages should not be reduced the full amount of his earnings in

such business. *Williams v. Chicago Coal Co.*, 60 Ill. 149; *Benziger v. Miller*, 50 Ala. 206; *Williams v. Anderson*, 9 Minn. 50.

If the plaintiff has sold the standing trees upon the soil, this may be shown, in mitigation of damages, in an action of trespass for breaking the close, against the purchasers of the trees; and his admission that he has sold them is evidence of the fact. *Wallace v. Goodall*, 18 N. H. 439. See *ante*, Vol. 2, p. 467, title *Damages*.

§ 3. **What cannot be shown.** A defendant, proved to have uttered slanderous words of plaintiff, is not entitled to show facts tending to prove them true, and have them considered, either in mitigation of damages, or as showing a privileged communication, if it appears that he uttered the slander without believing it to be true. *Quinn v. Scott*, 22 Minn. 456.

On the trial of an action for slander, it is not error to refuse to permit the defendant to introduce in evidence the papers and entries of record in a former suit by him as administrator of his father's estate against the plaintiff, for the purpose of showing that if the words charged were spoken they were spoken when the defendant was engaged in duties as administrator, in trying to get the property of which the deceased was the owner, for the purpose of mitigating the damages, and to rebut the presumption of malice in the defendant and to show malice on the part of the plaintiff. *Hutts v. Hutts*, 51 Ind. 581.

Words uttered by the plaintiff of the defendant, on a provocation given on a former occasion, are not admissible in mitigation. *Jarvis v. Manlove*, 5 Harring. (Del.) 452; *Sheffill v. Van Deusen*, 15 Gray (Mass.), 485; *Andrews v. Bartholomew*, 2 Metc. 509. Nor can the defendant plead, either in defense or mitigation, that the plaintiff has been guilty of a specific crime in no way connected with the defamatory words, or with the occasion on which they were spoken. *Fisher v. Tice*, 20 Iowa, 479; *Swift v. Dickerman*, 31 Conn. 285; *Fisher v. Patterson*, 14 Ohio, 418. So where in case for slander the defendant pleaded that the plaintiff committed an offense with one person, he may not give evidence tending to show, that he had committed a like offense with other persons, either as a defense, or in mitigation of damages. *Pallet v. Sargent*, 36 N. H. 496. Nor is it competent for the defendant to show that subsequent to the speaking of the slanderous words the plaintiff attempted to bribe one of his witnesses; the plaintiff's character at the time of the slander is the true subject of inquiry. *Tolleson v. Posey*, 32 Ga. 372. So a breach by the plaintiff of a contract sued upon since action brought, cannot be pleaded or given in evidence in reduction of damages to avoid circuity of

action. *Bartlett v. Holmes*, 13 C. B. 630; 17 Jur. 858; 22 L. J. C. P. 182.

It is well settled that the defendant cannot prove the truth of the matters charged, or give any evidence tending to prove the truth thereof, in mitigation of damages. *Swift v. Dickerman*, 31 Conn. 285; *Petrie v. Rose*, 5 Watts & Serg. 364; *James v. Clarke*, 1 Ired. 397. General rumors, or a general suspicion that the party is guilty of the acts imputed, are, however, admissible for that purpose; but evidence of mere reports, rumors or suspicions, cannot be received. For if before the speaking complained of, there exists a general rumor or suspicion that the party is guilty of the criminal act charged against him, the character is already traduced, and the evidence is, in effect, the same as that of general bad character in reference to the crime imputed; which is only admissible when the charge has obtained general notoriety, and a general belief or suspicion of its truth is entertained. The belief or suspicion of guilt, entertained by a few, does not constitute general character. It may not be productive of injury and is not admissible in evidence in mitigation. *Blickenstaff v. Perrin*, 27 Ind. 527. And see *Parkhurst v. Ketchum*, 6 Allen (Mass.), 406; *Swift v. Dickerman*, 31 Conn. 285; *Beardsley v. Bridgman*, 17 Iowa, 290. So, in an action of slander for repeating a story that the plaintiff, an unmarried woman, had been delivered of twins, evidence that rumors charging her with fornication, previously prevailed in the vicinity, is not admissible either in bar or in mitigation of damages. *Peterson v. Morgan*, 116 Mass. 350.

Counter-publications which are not libelous and could have no force as a provocation are not admissible in evidence in mitigation of damages. *Whittemore v. Weiss*, 33 Mich. 348. Nor can the defendant prove an independent libel on himself by the plaintiff. *Child v. Homer*, 13 Pick. 503. But where such libel by the plaintiff affords a reasonable presumption that it provoked the libel by the defendant, or where it impliedly refers to it, or explains the meaning of it, or the occasion of writing it, it is admissible in evidence to mitigate the damages. *Child v. Homer*, 13 Pick. 503; *Watts v. Fraser*, 7 A. & E. 223; 1 M. & Rob. 449; 7 C. & P. 369; *Moore v. Oastler*, 1 M. & Rob. 451. General evidence that the plaintiff has been in the habit of libeling the defendant is inadmissible. *Wakly v. Johnson*, R. & M. 422; *Finnerty v. Tipper*, 2 Camp. 76.

The consideration that the defendant might be prosecuted criminally for the money on which an action for damages is founded is no ground for reducing the damages in such civil action. *Ransone v. Christian*, 56 Ga. 351; Vol. 2, p. 468.

In ascertaining the damages to which the plaintiff is entitled, in trover, after judgment by default or *nil dicit*, evidence, which can only mitigate the damages by subverting the judgment, is inadmissible. *Curry v. Wilson*, 48 Ala. 638. In an action by a husband and wife, on account of injuries received by the latter, in being forcibly prevented from entering her house, evidence that the husband, some time before, had obtained possession of the house fraudulently from one of the defendants, is inadmissible in mitigation of damages. *Jacobs v. Hoover*, 9 Minn. 204.

Where property has been seized by virtue of a void attachment, a subsequent levy thereon without a return to and acceptance by the owner or without his consent while in the hands of the officer, by virtue of a valid attachment against him, is not a defense, nor does it go in mitigation of damages in an action for the unlawful taking. *Tiffany v. Lord*, 65 N. Y. (20 Sick.) 310. See Vol. 6, pp. 113, 114, 223, 224.

§ 4. **Who may interpose the defense.** One committing a tort — as where a railroad company burns down a house through careless employees — cannot set up in mitigation of damages, that an insurance company, or other third party, has partly indemnified the injured party. *Weber v. Morris, etc., R. R. Co.*, 36 N. J. Law, 213. The same doctrine was held in a case where a party brought an action against a town for injuries received through a defect in the highway. *Harding v. Townshend*, 43 Vt. 536.

§ 5. **How interposed.** The defendant, in an action of slander, may, under a plea of the general issue, offer evidence in mitigation of damages. But he cannot, under that plea, introduce testimony of the truth of the statements charged to be slanderous. *Jarnigan v. Fleming*, 43 Miss. 710; 5 Am. Rep. 514; *Hutchinson v. Wheeler*, 35 Vt. (6 Shaw) 330; *Smith v. Smith*, 39 Penn. St. 441; *Blickenstaff v. Perrin*, 27 Ind. 527. So, where the averment of the declaration was the imputation by the defendant to the plaintiff of general unchastity and the general issue alone was pleaded, evidence may be offered in mitigation of damages, that the general reputation of the plaintiff for chastity was bad. *Conroe v. Conroe*, 47 Penn. St. 198. But the defendant could not introduce evidence, under the general issue, to prove that the general reputation of the house, in which the plaintiff lived, was that it was a house of ill-fame. *Hackett v. Brown*, 2 Heisk. (Tenn.) 264. And see *Burke v. Miller*, 6 Blackf. 155. So, in slander for charging the plaintiff with stealing, the defendant cannot prove under the general issue, in mitigation of damages, that there was a report, in the neighborhood of the plaintiff, that he had been guilty of stealing from the plaintiff. *Young v. Bennett*, 5 Ill. (4 Scam.) 43.

In an action for libel the defendant may under the general issue prove in mitigation of damages, any ground of suspicion short of facts, which would, if pleaded, have amounted to a complete justification. *Knobell v. Fuller*, Peake's Add. Cas. 139. But see *Underwood v. Parkes*, Stra. 1200; *Mullett v. Hulton*, 4 Esp. 248. But he cannot give evidence of any fact in mitigation of damages which would be evidence to prove a justification of any part of the libel; he ought to justify as to that part. *Vessey v. Pike*, 3 C. & P. 512. By pleading the general issue, the defendant virtually admits the falsehood of the statements on which the action is based, but if it is proved that he did publish them, he may then, under the issue, show any circumstance in mitigation which tends to disprove malice, but does not tend to prove the truth of the charge. *Thomas v. Dunaway*, 30 Ill. 373. He may therefore prove prior publications by the plaintiff of a provoking nature. *Id.*; *Watts v. Fraser*, 7 A. & E. 223; 1 M. & Rob. 449; 7 C. & P. 369; *Moore v. Oastler*, 1 M. & Rob. 451. And he may prove facts and circumstances calculated to mislead him in the publication of the libel, to rebut the presumption of express malice, whether such facts tended to prove the truth of the libel or not. *Van Derveer v. Sutphin*, 5 Ohio (N. S.), 293.

In an action for false imprisonment the defendant, under the plea of not guilty, may give in evidence the excuse, if it merely goes in mitigation of damages, though he cannot do so without a special plea, if it amounts to a justification. *Linford v. Lake*, 3 H. & N. 276; 27 L. J. Exch. 334.

In detinue, under the plea of the general issue, where the plaintiff claims title to the property under a mortgage, evidence of the sale of the property under the mortgage by the plaintiff and its purchase by the defendant, after the plaintiff had acquired the possession under the statutory bond given by him in the action, is not competent evidence for the purpose of mitigating the defendant's damages. *Foster v. Chamberlain*, 41 Ala. 158.

A defendant justifying and failing in his proof may offer evidence in mitigation. *Morehead v. Jones*, 2 B. Monr. 210; *M'Nutt v. Young*, 8 Leigh, 542; *Sanders v. Johnson*, 6 Blackf. 50; *Thomas v. Dunaway*, 30 Ill. 373. Under the New York Code, it is claimed that in such case the mitigating circumstances should be set up in his answer. *Russ v. Brooks*, 4 E. D. Smith, 644.

Where words complained of as libelous allege a habit of committing a certain kind of unlawful or flagitious act, as well as a specific instance of the same, defendant may plead in defense or mitigation other

specific instances of the same kind of act, of which the plaintiff has been guilty. *Kimball v. Fernandez*, 41 Wis. 329.

Under the New York Code, matters in mitigation may be pleaded as a partial defense to an action for libel, and they must be so pleaded to be available at the trial. The fact that an answer commences as an answer in bar in the ordinary form cannot vitiate the same as an answer setting up mitigating facts and circumstances. Neither can the fact that such answer sets up matters which tend to show the truth of the charge contained in the publication. *Bennett v. Matthews*, 64 Barb. (N. Y.) 410.

In an action for slander a defendant cannot set up as a counter-claim, or to diminish plaintiff's damages, any act or declaration of the plaintiff, unless such act or declaration forms part of the *res gestæ*. *Richardson v. Northrup*, 56 Barb. (N. Y.) 105. If the words were spoken through the heat of passion, or under excitement, produced by the immediate provocation of the plaintiff, such excitement or passion may be shown in mitigation of damages; and under the Iowa practice, without alleging them specifically in an answer. *McClintock v. Crick*, 4 Iowa, 453. This rule would seem to apply generally. See *supra* and *ante*, Vol. 5, chapter on *Slander*.

CHAPTER XLVI.

MODIFICATION OF CONTRACT.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition and nature. The modification of a contract, is the *change* of a contract; and it may take place at the time of making the contract, by a condition which shall have that effect; for example, if I sell you one thousand bushels of corn upon condition that my crop shall produce that much, and it produces only eight hundred bushels, the contract is modified, it is for eight hundred bushels and no more. 2 Bouv. Law Dict. 190. The contract may be modified by the consent of both parties, after it has been made. See Bouv. Inst. *n.* 733.

The right to contract includes the right to modify, change or abrogate a pre-existing contract, therefore, any contract not under seal, whether in writing or verbal, may, by a subsequent verbal contract, be annulled or changed, and the last contract, if supported by a consideration, will bind the parties. *Bishop v. Busse*, 69 Ill. 403. And see *post*, p. 342, § 3; *Hewitt v. Brown*, 21 Minn. 163; *McGrann v. North Lebanon R. R. Co.*, 29 Penn. St. 82; *Low v. Forbes*, 18 Ill. 568. But a verbal agreement, to be effectual and binding as an alteration of the express terms of a prior written contract between the parties, must be supported by a new and valid consideration. And a mere executory contract of this kind, to constitute an exception to the rule, must have been acted on so far, that a refusal to carry it out would work a fraud on one of the parties. *Thurston v. Ludwig*, 6 Ohio St. 1. A parol agreement to enlarge the time for the performance of a specialty, if executory, and without sufficient consideration, is void. *Haynes v. Fuller*, 40 Me. 162. See *Esmond v. Van Benschoten*, 12 Barb. 366.

Neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the statute of frauds. *Hickman v. Haynes*, L. R., 10 C. P. 598; 44 L. J. C. P. 358.

§ 2. **Sealed contracts, how modified.** The time fixed for the performance of a contract under seal may be extended by parol agreement. *Stryker v. Vanderbilt*, 25 N. J. Law, 482; *Barker v. Troy and Rutland R. R. Co.*, 27 Vt. 766; *Stone v. Sprague*, 20 Barb. (N. Y.) 509. And where the time stipulated in an agreement under seal for the delivery of goods is extended by parol, the whole agreement becomes parol, and the sealed contract is admissible in evidence as an inducement to the parol promise. *Carrier v. Dilworth*, 59 Penn. St. 406. But a parol agreement to vary a contract under seal cannot be pleaded, in a court of law, to defeat a recovery on the original undertaking; and such a variation will not discharge a surety from liability. *Chapman v. McGrew*, 20 Ill. 101.

A written contract, although under seal and delivered up, may be rescinded by a subsequent parol agreement fully carried out. *Phelps v. Seely*, 22 Gratt. (Va.) 573. And a sealed building contract may be changed by a subsequent verbal agreement to pay an additional sum for the same work and materials mentioned in the original. *Cooke v. Murphy*, 70 Ill. 96. But a contract under seal for the sale and delivery of one thousand hogs of a certain weight and quality, at a price and by a day named in the agreement, cannot be changed by a new parol agreement for the delivery of a less number of hogs, founded on no new consideration. *Hume v. Taylor*, 63 Ill. 43.

An oral agreement for a new lease will not affect the surrender of an existing, written, sealed lease, by operation of law, unless a new lease is made which is valid in law to pass an interest according to the contract and the intention of the parties. *Coe v. Hobby*, 72 N. Y. (27 Sick.) 141; 7 Hun, 151. A verbal lease, therefore, for a term longer than one year, will not operate as a surrender of an existing lease under seal. *Id.* A contract or covenant under seal cannot be modified, before breach, by a parol executory contract. *Id.*

§ 3. **Written unsealed contracts, how modified.** Written contracts, not under seal, may be varied by parol, and assumpsit will lie upon both contracts, being of the same grade, the whole being set forth and performance alleged within the enlarged time. *Sherwin v. Rutland and Burlington R. R. Co.*, 24 Vt. (1 Deane) 347; *Grafton Bank v. Woodward*, 5 N. H. 99; *McFadden v. O'Donnell*, 18 Cal. 160; *Walker v. Millard*, 29 N. Y. (2 Tiff.) 375. But when the petition, declaration or complaint sets forth an absolute, independent agreement, unconnected with any other previous transaction, the plaintiff cannot, at the trial, blend the two contracts and graft the verbal on the prior written one. *Henning v. United States Ins. Co.*, 47 Mo. 425; 4 Am. Rep. 33. But to vary a written agreement, not under seal, by

parol, there must be a sufficient consideration. *Bailey v. Johnson*, 9 Cow. 115; *Henning v. United States Ins. Co.*, 47 Mo. 425.

An oral agreement may be shown to vary an agreement in writing, if it was made subsequent to the written agreement, even though it was made before the parties to the written agreement separated, upon the occasion of their executing it, especially where the oral agreement was consistent with the intention of the parties as evinced by their written contract. *Field v. Mann*, 42 Vt. 61. And see *Keating v. Price*, 1 Johns. Cas. 22. But a parol agreement to enlarge the time of delivering articles, which are, according to a written agreement of sale, to be delivered on demand, made at the time of or before the written contract, though repeated immediately afterward, is void, though for a valuable consideration. *Frost v. Everett*, 5 Cow. 497.

After a simple contract is broken and damage thereby accrued, it cannot be discharged by parol without satisfaction or some consideration, though it may before. But if the new agreement is upon good consideration and performed, it is a satisfaction and a defense; and it makes no difference that the prior agreement is in writing, and the new agreement verbal. *Cutler v. Smith*, 43 Vt. 577.

§ 4. **Effect of modification.** When a contract under seal is altered by the parties by a writing not under seal, or by a verbal agreement, it becomes merely a simple contract, and the rights, liabilities and remedies of the parties thereafter are determined accordingly. *Briggs v. Vermont, etc., R. R. Co.*, 31 Vt. (2 Shaw) 211; *Lawall v. Rader*, 24 Penn. St. 283; 2 Grant's Cas. (Penn.) 426; *Boyd v. Camp*, 31 Mo. 163.

Where, under a contract, the time for the delivery of goods is extended, no new contract is thereby created by which the liability of the vendor on the original contract will be changed. *Bacon v. Cobb*, 45 Ill. 47. And see *Robbins v. Potter*, 98 Mass. 532. Where the parties to a contract disagree as to a part of the work to be done, and enter into a new agreement with respect to it, such new agreement is binding, and so much is taken out of the first contract. *Stewart v. Keteltas*, 36 N. Y. (9 Tiff.) 388; *Palmer v. Stockwell*, 9 Gray (Mass.), 237; *Baasen v. Baehr*, 7 Wis. 516.

A letter by a shipper to the carrier under a written contract, which proposed a modification of the contract, but was not answered, does not affect the liability of the carrier for a breach thereof. *Collins v. Baumgardner*, 52 Penn. St. 461.

§ 5. **Who may interpose defense.** Where the plaintiff contracted to finish a building within a time specified, and the day before this time arrived a change in the front was agreed to and other changes in the plan were also made, and when completed the defendant paid part

of the contract price on the agreement making no objection as to time, it was held, in a suit for the balance due, that the defendant could not offset a claim for loss of rent by reason of the non-completion of the contract at the time first fixed upon, this provision of the contract having been waived. *McGinley v. Hardy*, 18 Cal. 115.

§ 6. **How interposed.** If an action is brought directly on the original contract, the defendant, if the contract has been modified, should set forth all the particulars of the modification in his plea or answer. If the action is on a *quantum meruit*, the defendant should set forth the original contract as modified, blend the two contracts and grafting the verbal contract on the prior written one.

A plea seeking to alter the terms of a written instrument by proof of the verbal declarations of the parties, made before or at the time of its execution, is bad. *Harlow v. Boswell*, 15 Ill. 56.

A parol agreement to vary a contract under seal cannot be pleaded in a court of law, to defeat a recovery on the original undertaking, and such a variation will not discharge a surety from liability. *Chapman v. McGrew*, 20 Ill. 101.

§ 7. **Evidence.** Where there is a simple contract in writing, oral evidence is admissible to show a subsequent agreement enlarging the time or changing the place of performance, or a waiver of, or a parol supplementary agreement supplying something not in the contract. *Coates v. Sangston*, 5 Md. 121; *Rigsbee v. Bowler*, 17 Ind. 167. So, in an action on a *quantum meruit*, for work and labor, it is competent to prove that the original contract has been changed at the request of the defendants, also the price of the extra work. *Mowry v. Starbuck*, 4 Cal. 274. But such substitution requires clear and explicit proof. *McGrann v. North Lebanon R. R. Co.*, 29 Penn. St. 82. The respective undertakings assumed by either party in such subsequent parol agreement constitute a sufficient consideration to support the promise of the other. *Low v. Forbes*, 18 Ill. 568. And its execution will be a good defense against an action upon the specialty. *Beach v. Covillard*, 4 Cal. 315.

Parties having made a written agreement, evidence of the declaration of one of them is not competent to prove that the agreement has been modified by them. *Hale v. Handy*, 26 N. H. 206. Nor is a written memorandum of one of the parties to a written contract admissible to show that it had been modified, but it may be used to show that such a modification was not considered unreasonable. *Palmer v. Fogg*, 35 Me. (5 Red.) 368. And where there is strong presumptive evidence that no oral contract, which was a modification of a former written one, has been agreed to, testimony of the verbal

negotiations previous to the date of the writing may be introduced to throw light upon the nature and character of the subsequent oral agreement. *Collins v. Lester*, 16 Ga. 410.

The rule as to contradicting or varying a written instrument by parol proof obtains with the same force in equity as at law. Therefore, where a written contract recited that the purchase-money was to be paid on a specified day, and that the vendor was to make title when the purchase-money was settled with him, and no fraud or mistake in its execution was alleged, it was held that the terms of the contract could not be varied in equity by proof of a contemporaneous parol agreement that the purchase-money was not to be paid on the day specified, but was to await a settlement of accounts between the parties. *Ware v. Cowles*, 24 Ala. 446.

A difficulty arising in ascertaining the mode of applying provisions of a contract to the subject-matter may be a sufficient consideration to support a modification of the contract, intended to avoid such a difficulty. *Perkins v. Hoyt*, 35 Mich. 506.

It cannot be accurately said that a contract is "modified" after a breach. By a breach, the contract is determined. A new contract may be made, but the old one is at an end. Hence, evidence cannot be competent to excuse a breach, by showing that after it took place, the terms of the contract were orally modified. *Wharton v. Missouri Car Foundry Co.*, 1 Mo. App. 577.

A subsequent parol contract cannot be admitted to control or defeat a deed or attach a condition or defeasance to it, nor can a sealed executory contract be released or rescinded by a parol executory contract. *Miller v. Hemphill*, 9 Ark. 488.

The parties to a written contract may afterward, by a parol agreement, substitute a different mode from that contained therein for the discharge of its obligations, and proof of the fulfillment of such parol agreement will be a defense to a suit brought upon the original contract. *Richardson v. Cooper*, 25 Me. (12 Shep.) 450.

CHAPTER XLVII.

MOLLITER MANUS IMPOSUIT.

ARTICLE I.

GENERAL RULES.

Section 1. Definition and nature. *Molliter manus imposuit* is a latin phrase and translated signifies "he laid his hands on gently." In pleading, it is a plea in justification of a trespass to the person, and when supported by evidence, it is a good plea.

Self-defense is a primary law of nature and it is held to be an excuse for breaches of the peace, and even for homicide itself. But care must be taken that the resistance does not exceed the bounds of mere defense, prevention or recovery, so as to become vindictive; for then the defender would himself become the aggressor. *Scribner v. Beach*, 4 Denio, 448, 450. The force used must not exceed the necessity of the case. *Elliott v. Brown*, 2 Wend. 497; *Gregory v. Hill*, 8 T. R. 299; *Baldwin v. Hayden*, 6 Conn. 453; 3 Bl. Com. 3-5; 1 Hawk. P. C. 130; *Cockcroft v. Smith*, 2 Salk. 642; *Curtis v. Carson*, 2 N. H. 539.

This subject has been noticed in the chapter on Assault and Battery, Vol. 1, pp. 334-347; in "Trespass," Vol. 6, pp. 120-122, and in "Defense of Self and Family" in Vol. 6, pp. 643-648, of this work. Under the last title the principles governing this plea have been so fully set forth that they need but a cursory notice here.

§ 2. **When a defense.** See titles above cited. A man may justify an assault and battery in defense of his lands or goods, or of the goods of another delivered to him to be kept. Hawk. P. C., b. 1, ch. 60, § 23; *Seaman v. Cuppledick*, Owen, 150; *Alderson v. Waistell*, 1 C. & K. 358; *Titley v. Foxall*, 2 Ld. Ken. 308. But in these cases, unless the trespass is accompanied with violence, the owner of the land or goods will not be justified in assaulting the trespasser in the first instance, but must request him to depart or to desist, and if he refuses, he should gently lay his hands on him for the purpose of removing him, and if he resist with force, then force sufficient to expel him may be used in return by the owner. *Weaver v. Bush*, 8 T. R. 78; Buller's N. P. 19; 1 East's P. C. 406; *Ballard v. Bond*, 1 Jur.

7. It is otherwise if the trespasser enter the close with force. In that case the owner may, without previous request to depart or desist, use violence in return, in the first instance, proportioned to the force of the trespasser, for the purpose only of subduing his violence. *Scribner v. Beach*, 4 Denio (N. Y.), 448; *Polkinhorn v. Wright*, 8 Q. B. 197; 10 Jur. 11; 15 L. J. Q. B. 70.

The resumption of the possession of land and houses by the mere act of the party is frequently allowed. Thus, a person having a right to the possession of lands may enter by force, and turn out a person who had a mere naked possession, and cannot be made answerable in damages to a party who has no right and is himself a *tortfeasor*. Although, if the entry in such case be with a strong hand, or a multitude of people, it is an offense for which the party entering must answer, criminally. *Hyatt v. Wood*, 4 Johns. 150; *Sampson v. Henry*, 13 Pick. 36.

In respect to personal property the right of recaption exists, with the caution that it be not exercised violently, or by breach of the peace, for should these accompany the act the party would then be answerable criminally. But the riot or force would not confer a right on a person who had none, nor would they subject the owner of the chattel to a restoration of it, to one who was not the owner. *Scribner v. Beach*, 4 Denio (N. Y.), 448. And see *Blades v. Higgs*, 10 C. B. (N. S.) 713; 7 Jur. (N. S.) 1289; 30 L. J. C. P. 347; 4 L. T. (N. S.) 551; *Gaylard v. Morris*, 3 Exch. 695; 18 L. J. Exch. 297. In the case of personal property, improperly detained or taken away, it may be taken from the house and custody of the wrong-doer, even without a previous request, but unless it was seized or attempted to be seized forcibly, the owner cannot justify doing any thing more than gently laying his hands on the wrong-doer to recover it. *Weaver v. Bush*, 8 T. R. 78; Com. Dig., Pleader, 3 M. 17; *Spencer v. McGowen*, 13 Wend. 256.

An owner of land who forcibly enters thereon, and ejects, without unnecessary force, a tenant at sufferance, who has had reasonable notice to quit, is not liable to an action for an assault. *Low v. Elwell*, 121 Mass. 309; 23 Am. Rep. 272; *Jackson v. Stansbury*, 9 Wend. 201; *Willard v. Warren*, 17 Wend. 257; Vol. 3, pp. 399, 400.

§ 3. **When not a defense.** Although a plea of *molliter manus imposuit* will justify an assault, it was never considered an answer to a charge of beating, wounding and knocking the party down. *Gregory v. Hill*, 8 T. R. 299; *Collins v. Renison*, Sayer, 138; *Gates v. Lounsbury*, 20 Johns. 427. And see *Johnson v. Northwood*, 1 Moore, 420; 7 Taunt. 689; *Oakes v. Wood*, 2 M. & W. 791; M. & H. 237.

A civil trespass will not justify the firing of a pistol at the trespasser, in sudden resentment or anger. If a person takes forcible possession of another's close, so as to be guilty of a breach of the peace, it is more than a trespass. So, if a man, with force, invades and enters the dwelling-house of another. But a man is not authorized to fire a pistol on every invasion or intrusion into his house; he ought, if he has a reasonable opportunity, to endeavor to remove the trespasser without having recourse to the last extremity. *Mead's Case*, 1 Lewin's C. C. 185; *Roscoe's Cr. Ev.* 262. The rule is, that in all cases of resistance to trespassers, the party resisting will be guilty, in law, of an assault and battery, if he resists with such violence that it would, if death had ensued, have been manslaughter. Where one manifestly intends and endeavors, by violence or surprise, to commit a known felony upon a man's person (as to rob, or murder, or to commit a rape upon a woman), or upon a man's habitation or property (as arson or burglary), the person assaulted may repel force by force, and even his servant, then attendant on him, or any other person present, may interpose for preventing mischief, and in the latter case the owner or any part of his family, or even a lodger with him, may kill the assailant, for preventing the mischief. *Foster's Crown Law*, 273. And see *Scribner v. Beach*, 4 Denio, 448.

A person on whose land another has committed a trespass, merely by coming upon it, and is going away, has no right to seize and detain him in order to compel him to give his address. *Ball v. Axten*, 4 F. & F. 1019.

Not until a request to depart and a refusal to obey can a land-owner be justified in resorting to force, to expel one who has peacefully entered his premises and committed no violence. *State v. Woodward*, 50 N. H. 527.

§ 4. **Excessive force.** See §§ 1, 2 and 3, *ante*, pp. 346, 347. Although a person has the right to eject another from his premises, who, peaceably entering, refuses to depart on request, or who forcibly enters the same, or who, being there, uses indecent or abusive language, or commits an assault upon him, yet, in so doing, he must use no more force than is reasonably necessary for that purpose, and if he uses more he will be liable in trespass for whatever damage is thereby done. *Abt v. Burgheim*, 80 Ill. 92; *Jones v. Jones*, 71 id. 562; *Scribner v. Beach*, 4 Denio, 448.

He who makes the first assault, if not justified in law in making it, has the burden of proving, in his action for an assault made upon him in resistance, that the force employed by the defendant in resisting and defending his person was excessive. *Ayres v. Birtch*, 35 Mich. 501.

§ 5. **Who may interpose the defense.** See preceding sections and authorities there cited.

The right of self-defense is not limited to actual peril of the party assailed, but includes the case where a reasonable man would apprehend either danger to his life or great bodily harm. *State v. Fraunburg*, 40 Iowa, 555.

A son can justify an assault and battery in defense of his father only where the latter was first assailed and was resisting the attack when the former interfered, and only to the extent of such force as was necessary for the father's defense. *Obier v. Neal*, 1 Houston (Del.), 449.

If a person, trespassing upon the land of another, and stealing wood, refuses to leave the premises when ordered to do so by the owner's agent, the latter may use sufficient force to eject the trespasser and prevent the removal of the wood. *Gyre v. Culver*, 47 Barb. (N. Y.) 592.

The owner of goods (or his servants acting by his command) which are wrongfully in the possession of another, may justify an assault in order to repossess himself of them, no unnecessary violence being used. *Blades v. Higgs*, 10 C. B. (N. S.) 713.

§ 6. **How interposed.** The defense is interposed by a special plea in which the enumeration of the trespasses intended to be justified must depend upon the statements in the declaration; in some cases it may be wholly unnecessary to enumerate them. See 3 Chitty on Pleadings, marginal page 1070, and note.

CHAPTER XLVIII.

NECESSITY.

ARTICLE I.

GENERAL RULES.

Section 1. Definition and nature. Necessity is that which makes the contrary of a thing impossible. Whatever is done through necessity is done without any intention, and as the act is done without will and is compulsory, the agent is not legally responsible. Bacon's Max., Reg. 5. Hence the maxim, necessity has no law, indeed necessity is itself a law which cannot be avoided nor infringed. *Clef des Lois Rom.*, Dig. 10, 3, 10, 1; Comyn's Dig., Pleader (3 M. 20, 3 M. 30), 2 Bouv. Law Dict. 212. See *Accident*.

§ 2. **As to real estate.** If a public highway be out of repair, and impassable, a passenger may lawfully go over the adjoining land, since it is for the public good that there should be, at all times, free passage along the thoroughfares for the subjects of the realm. *Taylor v. Whitehead*, Dougl. 749; *Bullard v. Harrison*, 4 M. & S. 387; *Robertson v. Gantlett*, 16 M. & W. 296 (a). Such an interference with private property is obviously dictated and justified *summa necessitate*, by the immediate urgency of the occasion, and a due regard to the public safety or convenience. See *ante*, Vol. 6, pp. 346, 347, chapter on *Ways and Highways*.

An entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire, or any like danger, is not a trespass. So, where one enters upon the sea beach of another and removes, for the purpose of restoring it to its owner, a boat cast ashore by a storm, and in danger of being carried off by the sea, he is not a trespasser, the owner of the beach not having himself taken possession of the boat. *Proctor v. Adams*, 113 Mass. 376; 18 Am. Rep. 500; Vol. 6, pp. 70, 71.

It not unfrequently becomes a question whether an obstruction complained of as a nuisance is justifiably by reason of the necessity of the case, as when it occurs in the usual and necessary course of the party's lawful business. The defendant, a timber merchant, occupied a small

timber yard close to the street, and, from the smallness of his premises, he was obliged to deposit the long pieces of timber in the street, and to have them sawed up there before they could be carried into the yard. It was argued that this was necessary for his trade, and that it occasioned no more inconvenience than draymen letting down hogsheads of beer into the cellar of a publican. But Lord ELLENBOROUGH said: "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So, as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily, in repairing the house; but if this inconvenience be prolonged for an unreasonable time, the public have a right to complain and the party may be indicted for a nuisance. The defendant is not to eke out the inconvenience of his own premises by taking in the public highway into his timber-yard, and if the street be narrow, he must remove to a more commodious situation for carrying on his business." *Jones' Case*, 3 Campb. 230; *People v. Cunningham*, 1 Denio, 524. So, although a person, who is rebuilding a house, is justified in erecting a *hoard* in the street, which serves as a protection to the public, yet, if it encroach unnecessarily upon the highway, it is a nuisance. *Commonwealth v. Passmore*, 1 S. & R. 217. Slight inconveniences and occasional interruptions in the use of a highway, or navigable streams, which are temporary and reasonable, are not illegal merely because the public may not, for the time, have the full use of the highway or stream. *People v. Horton*, 64 N. Y. (19 Sick.) 610. And see *Bush v. Steinman*, 1 Bos. & Pul. 407; *Russell's Case*, 6 East, 427; 6 B. & C. 566. See *ante*, Vol. 4, pp. 726-785, chapter on *Nuisances*.

§ 3. **As to personal property.** The excuses of self-defense and of the defense of one's house, family and goods, are founded on necessity, and these defenses have been fully treated of in the preceding chapters. See chapters on *Defense of Self, etc.*, Vol. 6, p. 643, *Molliter Manus Imposuit*, *ante*, p. 346, and *Judicial Proceedings*, *ante*, p. 173. If a ferryman overload his boat with merchandise a passenger may, in case of necessity, throw overboard the goods to save his own life and the lives of his fellow-passengers. *Mouse's Case*, 12 Rep. 63.

§ 4. **As to the person.** See *ante*, the chapters referred to in the preceding section.

Where two persons, being shipwrecked, have got on the same plank, but, finding it not able to save them both, one of them thrusts the other from it and he is drowned, this homicide is excusable through unavoidable necessity, and upon the great universal principle of self-

preservation which prompts every man to save his own life in preference to that of another where one of them must inevitably perish. 4 Bl. Comm. 186; 1 Russ. on Crimes (3d ed.), 664. As a general rule, the law charges no man with default where the act done is compulsory and not voluntary, and where there is not a consent and an election on his part; and, therefore, if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carries a privilege in itself. Broom's Legal Maxims, p. 54.

§ 5. **Who may interpose the defense.** A ministerial officer, in executing judicial process in pursuance of the commands he receives in the name of the government from a court of justice, is entitled to interpose the defense. He is not a volunteer acting from his own free will or for his own benefit, but he is imperatively commanded to execute the writ or process. He is the servant of the law and the agent of an overruling necessity, and if the service of the law be a reasonable service, he is justly entitled to expect indemnity, so long as he acts with diligence, caution and pure good faith. See *ante*, p. 173. chapter on *Judicial Proceedings*. Master and servant, parent and child, husband and wife, killing or wounding an assailant in the necessary defense of each other respectively, are excused, the act of the relation assisting being construed the same as the act of the party himself. See *ante*, Vol. 6, pp. 643-648, chapter on *Defense of Self and Family*. "The law itself and the administration of it," said Sir W. Scott, with reference to an alleged infraction of the revenue laws, "must yield to that to which every thing must bend—to necessity; the law in its most positive and peremptory injunctions is understood to disclaim, as it does in its general aphorisms, all intention of compelling them to impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases. In the performance of that duty it has three points to which its attention must be directed. In the first place, it must see that the nature of the necessity pleaded be such as the law itself would respect, for there may be a necessity which it would not. A necessity created by a man's own act, with a fair previous knowledge of the consequences that would follow, and under circumstances which he had then a power of controlling, is of that nature. Secondly, that the party who was so placed, used all practicable endeavors to surmount the difficulties which already formed that necessity and which, on fair trial, he found insurmountable. I do not mean all the endeavors which the wit of man, as it exists in the acutest understanding, might suggest, but such as may reasonably be expected from a fair degree of discretion and an ordinary knowledge

of business. Thirdly, that all this shall appear by distinct and unsuspected testimony, for the positive injunctions of the law, if proved to be violated, can give way to nothing but the clearest proof of the necessity that compelled the violation." *The Generous*, 2 Dods. 323, 324.

§ 6. **How interposed.** The defense of necessity to be available must be interposed by particularly setting forth in the answer the facts constituting the necessity; and these facts must be proved by distinct and unsuspected testimony.

CHAPTER XLIX.

NON-PERFORMANCE OF CONDITION PRECEDENT.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition and nature. Whenever either of the parties to a contract is bound to do some act before the other is under any obligation to perform his covenants, the performance of such act, which must be first done, is called a *condition precedent*; and the reason is, because the doing of that act is a condition which precedes a right to call upon the other party to do any thing. 1 Wait's Law and Practice (3d ed.), p. 113.

What is or what is not a condition precedent depends not on merely technical words, but on the plain intention of the parties, to be deduced from the whole instrument. *Id.*; *Roberts v. Brett*, 11 H. L. Cas. 337; 34 L. J. C. P. 337.

When the covenants are such that neither of the parties is bound to do any thing as a condition precedent to a performance by the other, the covenants are said to be *independent*; which is, that each party is bound to perform his covenants, whether the other does so or not. Whenever the acts or covenants of both parties are to be performed at the same time, and neither of them can maintain an action against the other without alleging and proving that he has performed the covenants on his part, the covenants are said to be *mutual*, or *dependent*. In the case of mutual and dependent covenants there is always a condition precedent to be alleged and proved by the party who brings the action. But in the case of independent covenants, and in those cases where the covenants are all independent, there never need be any condition precedent alleged or proved by the plaintiff. *Id.* 114. Some confusion has arisen from the failure to discriminate between the cases of independent covenants, and those of conditions precedent, and they have been frequently confounded together as being really the same thing. This confusion can best be explained by quoting from 1 Wait's Law & Pr., p. 114, *et seq.*: "If there is a specified time at which each party is to perform his covenants, and the parties are not to perform their

covenants at the same time, then the covenants of each party are independent, in the sense that either may sue without alleging a performance of his own covenants. *Sheeren v. Moses*, 84 Ill. 448. But if one party is to perform an act by a specified day, and the other is not to pay for it until after the performance of the act, in such case the covenant of one party is independent, and that of the other dependent; because the promise to do the act is an independent promise, and if not performed at the time, an action will lie against him, without any allegation of performance or tender by the other party. *Id.* But the promise to pay is mutual and dependent, and if an action is brought for the recovery of the payment, the plaintiff must allege and prove the performance of the act to be done on his part." *Id.*; *Howe v. Huntington*, 15 Me. 350; *Perry v. Wheeler*, 24 Vt. 286; *Dunham v. Pettee*, 8 N. Y. (4 Seld.) 508.

"It is thus seen, that although some of the covenants in the same contract are independent and others dependent, that does not, of itself, determine whether the performance of a condition-precedent must be alleged. And there is but a single class of cases in which the covenants are independent, in the sense that either party may sue the other without alleging the performance of any condition precedent, and those cases are: when there is a time specified in the contract at which each party must perform his contract, without reference to any performance on the part of the other party; and, when the parties are each of them to perform his covenants at a time different from that of the other. In every other case the covenants of one party must be mutual and dependent, in the sense that he must allege and prove the performance of the conditions precedent on his part, if he brings an action; although it may be true that the covenants may be independent, in the sense that the other party may sue without alleging or proving the performance of any condition precedent on his part. The reason of this is, that when a specified time is fixed for the performance of the covenants by one party, and no time is fixed for the performance of the other, and the mutual covenants are the consideration of each other, it is evident that one party is to do the acts which he covenants to do before he is entitled to payment, and he must allege performance if he sue the other party; but if the act is not done at the time specified, that will be a breach of the covenant, and an action will lie for such breach, without any performance by the other party; and this is so, because the party chose to covenant for the performance of his acts at a specified time, without making it a condition that the other party should do any act as a condition precedent to a performance upon his own part."

Where a covenant or agreement may be treated as independent, and an action brought on it, yet if that is not done until the party who might thus sue becomes bound, on his part, to perform some act under the same contract, the two acts then become dependent acts, and neither party can sue without first performing or tendering performance on his part. *Irwin v. Lee*, 34 Ind. 319.

A party to a contract may be held to strict performance as to time, and put in default for non-performance; and whether equity would relieve, would depend on circumstances. But to do this, the party seeking to put the other in default must not only be ready and willing to perform, but he must tender performance at the time, and demand performance from the other. *Hubbell v. Van Schoening*, 49 N. Y. (4 Sick.) 326; *Hapgood v. Shaw*, 105 Mass. 276; *Nelson v. Plimpton Fire Proof Elevating Co.*, 55 N. Y. (10 Sick.) 480; *Turner v. Mellier*, 59 Mo. 526. Performance is a condition precedent to the right of payment upon the contract. Substantial performance is not enough, when the person for whom the work was done has neither voluntarily accepted it, nor waived a faithful performance of the contract. A condition precedent must be strictly performed, and if a person, by contract, engages to perform an act, performance is not excused by inevitable accident. *Crane v. Kunbel*, 34 N. Y. Supr. Ct. 443; (2 J. & Sp.) *Brown v. Fitch*, 33 N. J. Law (4 Vr.) 418; *Taylor v. Caldwell*, 3 B. & S. 826; 32 L. J. Q. B. 164; 11 W. R. 726; 8 L. T. (N. S.) 356; Vol. 6, pp. 432, 434, 435.

And in an executory contract for the sale of an article to be paid for on delivery at any time within a certain period, the obligations of the one party to pay, and the other to deliver are mutual and dependent; and in an action by the seller for the price, it is not enough simply to show the default of the purchaser, he must show that he was ready and offered to deliver the goods. Whichever party seeks to enforce the contract against the other, must show performance or a tender of performance on his part. 1 Wait's Law & Pr. 117; *Dunham v. Mann*, 8 N. Y. (4 Seld.) 508; S. C., 4 E. D. Smith, 500; *Barbee v. Willard*, 4 McLean, 356.

Where the plaintiffs and the defendants entered into an agreement, whereby the plaintiffs agreed to sell and deliver to the defendants all the coal they should want for their use, for a year, or until the next spring, at \$5.50 per ton, deliveries to be made as long as defendants should wish them, the defendants agreeing to receive the same at that price. A large amount of coal was delivered under this contract, but subsequently, and before the expiration of the time therein specified, the price of coal having risen, the plaintiffs refused to deliver any coal

under it. In this action brought by them to recover the value of the coal delivered, it was held that the contract was not an indivisible one, and full performance was not a condition precedent to a recovery by plaintiff, that as no time of payment was specified in the contract, they were entitled to demand the pay for each lot of coal delivered, and that they were therefore entitled to recover the price of the coal delivered, subject to the defendant's right to recoup any damages they might have sustained by reason of the breach of the contract. *Per Lee v. Beebe*, 13 Hun (N. Y.), 89. And see *Sinclair v. Bowles*, 9 B. & C. 92; Vol. 5, pp. 571, 572.

§ 2. **When a sufficient ground of defense.** It is a good defense to an action on a contract, that the obligation to perform the act required was dependent upon some other thing which the other party was to do, and has failed to do. And if before the one party has done any thing, it is ascertained that the other party will not be able to do that which he has undertaken to do, this will be a sufficient reason why the first party should do nothing. *Moakley v. Riggs*, 19 Johns. 69; *Short v. Stone*, 8 Q. B. 358; *Ford v. Tiley*, 6 B. & C. 325; *Vanhorne v. Dorrance*, 2 Dall. 304; *Taylor v. Mason*, 9 Wheat. 350. And if it is provided that the thing shall be done "unless prevented by unavoidable accident," the accident to excuse the not doing, must be not only unavoidable, but must render the act physically impossible, and not merely unprofitable and inexpedient by reason of an increase of labor and cost. Thus a lessee of a house who covenants generally to repair, is bound to rebuild it, if it be burned by an accidental fire. *Bullock v. Dommitt*, 6 T. R. 650. And see *Atkinson v. Ritchie*, 10 East, 530; *Harmony v. Bingham*, 12 N. Y. (2 Kern.) 99; *Esposito v. Bowden*, 7 Ellis & B. 763; reversing S. C., 4 id. 963; 30 Eng. Law & Eq. 336.

If one bound to perform a future act, before the time for doing it declares his intention not to do it, this is no breach of his contract; but if his declaration be not withdrawn, when the time comes for the act to be done, it constitutes a sufficient excuse for the default of the other party. In all cases whatever, a promisor will be discharged from all liability when the non-performance of his obligation is caused by the act or the fault of the other contracting party. Thus, where one was bound to deliver a deed on a day certain, and at the day was ready with the deed, and would have tendered it but for the evasion of the other party, this was held to be equivalent to a tender. *Borden v. Borden*, 5 Mass. 67; *Goodwin v. Holbrook*, 4 Wend. 377; *Grandy v. McCleese*, 2 Jones' Law, 142. Where one party covenants to give a deed on a certain day, and the other covenants to pay money on the same day, neither can maintain an action against the other until he has

performed or tendered performance on his part. *Green v. Reynolds*, 2 Johns. 207; *Robertson v. Robertson*, 3 Rand. 68; *Meriwether v. Carr*, 1 Blackf. 413. And if a conveyance is to be made on a day prior to that which is appointed for the payment of the consideration, the conveyance is a condition precedent to the payment. *Horine v. Best*, 2 Bibb, 547. And where the performance of work to be done is to precede payment and is a condition thereof, the contractor, having substantially failed to perform on his part, cannot recover for his labor and materials, notwithstanding the owner has chosen to enjoy the benefit of the work done. *Harris v. Rathbun*, 2 Abb. (N. Y.) App. Dec 326. And see *Glacius v. Black*, 50 N. Y. (5 Sick.) 145; 10 Am. Rep. 449. And in determining whether a contractor is excused from the performance of a condition precedent, the interference of a third party cannot be considered, but only the circumstances of the contract, and the object sought to be accomplished by the condition. *The Bowery National Bank v. The Mayor, etc., of New York*, 63 N. Y. (18 Sick.) 336. In an action involving a condition precedent the complaint itself must show, either performance of the condition, or else a waiver thereof, or other facts excusing performance. *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Fultz v. House*, 6 Smedes & Marsh. 404; *Levy v. Bargess*, 64 N. Y. (19 Sick.) 390. So, where a privilege reserved to a lessee, by the lease, of purchasing the property, is, by the terms of the contract, made dependent on the performance of a certain covenant by him, as lessee, the privilege cannot be exercised without performing or offering to perform such covenants. *Gilbert v. Port*, 28 Ohio St. 276. A contract made in contemplation of the passage of legislative acts which are essential to the object of the contract, and the passage of which was confidently expected by both parties, cannot be enforced where the legislature refuses to pass those acts and adopts other measures entirely defeating the object of the parties in making the contract. *Miles v. Stevens*, 3 Penn. St. 21; 3 Penn. L. J. 434.

It is a well-settled rule of the law, and worthy of reiteration, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. *Paradine v. Jayne*, Aleyn, 27; *Beale v. Thompson*, 3 Bos. & P. 420; *Beebe v. Johnson*, 19 Wend. 500; *School Trustees of Trenton v. Bennett*, 27 N. J. Law, 514. See *Dermott v. Jones*, 2 Wall. 1; Vol. 1, pp. 106, 383.

§ 3. **When a partial defense.** Where a special contract has been only partly performed, the mere fact that the part performance has been beneficial is not enough to render the party benefited by it lia-

ble to pay for this advantage; it must be shown that he has taken the benefit of the part performance under circumstances sufficient to raise an implied promise to pay for the work done, notwithstanding the non-performance of the special contract. Thus, where the plaintiff had undertaken to complete certain work, for a specified price, on houses belonging to the defendant, the whole to be completed by a particular day, and to the satisfaction of the surveyor, who was named, failed to complete the work according to the terms of the contract, but did work upon the houses, and the defendant afterward resumed the possession of the houses, and was, therefore, at the time of the trial, to some extent, enjoying the fruit of the labors of the plaintiff, it was held, notwithstanding, that the plaintiff could not recover, either on the special contract or for work and labor, for the special contract had not been performed, and the mere fact that the defendant had taken possession of his own houses, upon which work had been done, did not afford an inference that he had dispensed with the conditions of the special agreement, or that he had contracted to pay for the work actually done according to measure and value. *Munro v. Butt*, 8 E. & B. 738; *Smith v. Brady*, 17 N. Y. (3 Smith) 173; *Cutter v. Powell*, 2 Smith's Leading Cas. 35; Vol. 3, pp. 605, 606. "But when the builder has in good faith intended to, and has substantially complied with the contract, although there may be slight defects, caused by inadvertence or unintentional omissions, he may recover the contract-price, less the damage on account of such defects. *Phillip v. Gallant*, 62 N. Y. (17 Sick.) 256, 264; *Glacius v. Black*, 50 N. Y. (5 Sick.) 145.

The maxim in chancery that he who seeks equity must do equity, when applied to a case of partial non-performance of an agreement, includes the rule at law which, in actions for damages on contracts, discriminates between a whole or only a partial failure of performance; the breach being a bar when it goes to the whole, but no bar to a partial failure. In which case the party injured is entitled, by a cross action, to compensation. *Oxford v. Provand*, L. R., 2 C. P. 135; 5 Moore's P. C. C. (N. S.) 150. And, generally, the rule of law is, as recognized in the American courts, that where a plaintiff declares upon a general count for work done, goods sold, or the like, under a special contract, the defendant may give in evidence every thing that affects directly the value of the subject of the claim, as between the parties, including a breach of warranty, in reduction of damages. *Cutter v. Powell*, 2 Smith's Leading Cas. 35, 40. And see *Railroad Co. v. Smith*, 21 Wall. 255; *Bush v. Jones*, 2 Tenn. Ch. 190; *Wolf v. Gerr*, 43 Iowa, 339; *Goldsmith v. Hand*, 26 Ohio St. 101. In the State of New York, and apparently in Indiana and Alabama, the rule is ex-

tended further, under the name of *recoupment*, or diminution of damages, in virtue of which a defendant in an action, upon a *special contract*, even under seal, can, by giving notice, set up by way of recoupment any breach of the same contract by the plaintiff, so as to reduce the damages thereby. This defense, however, cannot be pleaded in bar of the action. See cases cited in 1 Wait's Law and Pr., pp. 184-187. And see *Epperly v. Bailey*, 3 Ind. 72; *Hatchett v. Gibson*, 13 Ala. 588; *Smith v. Smith* 45 Vt. 433. Where a contract for erecting a building provides that payment shall be made in installments, as successive portions of the work are completed, if the building is destroyed by inevitable accident before finished, the builder is entitled to be paid such installments as have been fully earned; but he cannot claim any portion of the next installment not fully earned. *Richardson v. Shaw*, 1 Mo. App. 234.

§ 4. **What excuses performance.** In general, in case of an entire contract, the party claiming under it must show full performance on his part; but full performance is excused where rendered impossible by the act of God, or of the law, or of the other party to the contract. *Jennings v. Lyons*, 39 Wis. 553; *Schwartz v. Daegling*, 55 Ill. 342; *Melville v. De Wolf*, 4 El. & Bl. 844; 1 Jur. (N. S.) 758; 24 L. J. Q. B. 200; 3 C. L. R. 960. Sickness or death is an act of God in such a sense as generally to excuse full performance of an entire contract, and permit a recovery on a *quantum meruit* (*Harrington v. Fall River Iron Works Co.*, 119 Mass. 82; Vol. 3, p. 606); but otherwise where the sickness is one which should have been foreseen and provided against by the party in default. *Jennings v. Lyons*, 39 Wis. 553; 20 Am. Rep. 57; Vol. 3, p. 606. But where a man, by his contract, binds himself to do a thing, he is bound to do it if he can, notwithstanding any accident, because he ought to have guarded by his contract against it. *Clark v. Glasgow Assur. Co.*, 1 Macq. H. L. Cas. 668; *Fischel v. Scott*, 15 C. B. 69; *Pope v. Bavidge*, 10 Exch. 73; *Stees v. Leonard*, 20 Minn. 494; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. (15 Sick.) 487; S. C., 3 Thomp. & C. 368. But where, from the nature of the contract, it is apparent the parties contracted on the basis of the continued existence of a given person or thing, a condition is implied, that if the performance becomes impossible, from the perishing of the person or thing, that shall excuse the performance. *Walker v. Tucker*, 70 Ill. 527. See *Pole v. Cetovich*, 2 F. & F. 104. But where the performance of a stipulation in a contract is made to depend upon the continued existence, at the maturity of the contract, of another contract existing between the party who is to perform such stipulation and a person who

is not a party to the contract containing the stipulation, and, before the maturity of the contract containing the stipulation, the other contract is terminated, not by operation of its provisions, but by the consent of the person who is to perform the stipulation, without the knowledge or consent of the other party to the contract containing the stipulation, the performance of the stipulation will not be excused because of the termination of the other contract before the maturity of the contract containing such stipulation. *Durland v. Pitcairn*, 51 Ind. 426. If an employee, who is under a contract to serve his employer for a fixed period, leaves the service before the expiration of the time, he is not entitled to recover what may be his due, after deducting damages for the breach of contract, until the time of payment fixed by the contract. *Powers v. Wilson*, 47 Ind. 666.

One of the parties to a contract cannot complain of a failure to perform on the part of the other, if his own *laches*, or refusal to perform, has contributed to defeat the object of the contract. *Smith v. Cedar Rapids, etc., R. R. Co.*, 43 Iowa, 239; *Taylor v. Renn*, 79 Ill. 181; *Coultee v. Board of Education*, 63 N. Y. (18 Sick.) 365; *Buffkin v. Baird*, 73 No. Car. 283; *European and Australian Royal Mail Co. v. Royal Mail Steam Packet Co.*, 30 L. J. C. P. 247; *Hall v. Conder*, 3 Jur. (N. S.) 963; 2 C. B. (N. S.) 53; 26 L. J. C. P. 288.

An agreement that a defendant might leave the service if he was dissatisfied with it, authorizes him to terminate the agreement. *Rosster v. Cooper*, 23 Vt. 522; *Durgin v. Baker*, 32 Me. 273; Vol. 3, p. 581.

And where one party to a contract, in executing it, follows the direction of the other, the latter cannot complain of the manner of the performance. *Kansas, etc., R. R. Co. v. McCoy*, 8 Kans. 538; *Siebert v. Leonard*, 17 Minn. 433; *Doyle v. Halpin*, 33 N. Y. Supt. Ct. (1 J. & Sp.) 352. And if one party to an executory contract has, by his own act, or default, prevented the other party from fully performing his contract, the party thus preventing performance cannot take advantage of his own act or default to exonerate himself from paying for what has been done under the contract. *Niblo v. Binsse*, 3 Abb. (N. Y.) App. Dec. 375. See *Ketchum v. Zeilsdorff*, 26 Wis. 514; *Wheatly v. Covington*, 11 Bush (Ky.), 18. But where the plaintiff contracted to build an organ for the defendants, payment to be made when it should be completed. Before completion the plaintiff mortgaged it in its unfinished condition, as security for advances made by the defendants to enable him to continue work upon it. Subsequently it was sold, uncompleted, by the defendants, under the mortgage, for default in payment. It was held that the defendants, by enforcing the mortgage, did not so prevent performance of his contract by the plaintiff, that he

could recover from them the contract price. *Wallman v. Society of Concord*, 45 N. Y. (6 Hand) 485.

If one of the parties to a contract attempts to vary or change its terms, the other is thereby released; and an unintentional part performance, which is withdrawn as soon as discovered, will not imply an assent to the change. *Turner v. Baker*, 30 Ark. 188.

Where one is engaged to perform certain professional services (as here to play a piano at a concert on a specified day) and is prevented from performance by illness and consequent incapacity, he is excused, inasmuch as the contract is in its nature not absolute, but conditional upon the party being well enough to perform. *Robinson v. Davison*, L. R., 6 Exch. 269; 40 L. J. Exch. 172; 24 L. T. (N. S.) 755; 19 W. R. 1036. See *Cutter v. Powell*, 2 Smith's Leading Cas. 47; Vol. 3, p. 606. Continued and repeated defaults in payment, according to the provisions of a contract, will justify the contractors in abandoning the work before its completion, and entitle them to recover as damages what the uncompleted portion of the work would amount to at the contract-price beyond the cost to them of completing it. *Grand Rapids, etc., R. R. Co. v. Van Dusen*, 29 Mich. 431.

§ 5. **Consent to waive performance.** Any or all of the several provisions of a written contract may be waived by parol. *American Corrugated Iron Co. v. Eisner*, 39 N. Y. Supt. Ct. (7 J. & Sp.) 200. Refusal of an employer to permit his contractor to finish the work waives performance, and warrants the contractor in suing to recover the difference between the contract-price and what it would have cost him to finish the building. *Park v. Kitchen*, 1 Mo. App. 357. See *Wheatly v. Covington*, 11 Bush (Ky.), 18. Knowingly acquiescing in a deviation from a contract is deemed a waiver of its strict performance. *Pike v. Nash*, 3 Abb. (N. Y.) App. Dec. 610; *Garrison v. Dingman*, 56 Ill. 150; *Waters v. Harvey*, 3 Houst. (Del.) 441. See *Duffy v. O'Donovan*, 46 N. Y. (1 Sick.) 223. But an acceptance by an employer of work done upon his property (as upon a house) is not a waiver of any defense to a contract based upon defects in its performance. *Yeats v. Ballentine*, 56 Mo. 530; *Reed v. Board of Education of Brooklyn*, 4 Abb. (N. Y.) App. Dec. 24. To constitute a waiver of a claim for a breach of warranty or contract the acts or circumstances relied on to constitute a waiver must have been performed or have transpired after the party against whom the waiver urged knew or should have known the facts, constituting the breach of warranty or contract. *Dodge v. Minn., etc., Roofing Co.*, 14 Minn. 49.

Where time is made the essence of the contract, and it is stipulated

that the party who fails in performance shall lose his interest therein, such failure does not render the contract null and void. A subsequent part performance by the party not delinquent is a waiver of the breach. *Audubon County v. American Emigrant Co.*, 40 Iowa, 460. See *Murphy v. Buckman*, 66 N. Y. (21 Sick.) 297.

§ 6. **Refusal to accept performance.** An offer by one party to perform, and a refusal by the other party to accept services stipulated in the contract, are not equivalent to performance. *Wood v. Morgan*, 6 Bush (Ky.), 507. So a refusal to accept a tender of a part of a quantity of lumber, stipulated, in an executory contract, to be manufactured of a certain quality, will not excuse from further performance on the part of the manufacturer. *Collins v. Delaporte*, 115 Mass. 159. But, where by a contract between the parties, the assignment of a lease by the plaintiff, with the assent of the landlord, was a condition precedent, it was held that an offer of performance by the plaintiff, and an absolute refusal to accept upon the part of the defendant, excused a formal tender by the former of an assignment executed by him, with the written assent of the landlord thereto. *Blewett v. Baker*, 58 N. Y. (13 Sick.) 611. And where the defendant agreed to allow the plaintiff to dig moulding sand on the premises of the former in places to be designated by him, during a specified period, at a certain rate per ton; and the plaintiff dug sand at a place designated by the defendant until the sand at that place was exhausted, when, although the time specified had not expired, and there were other deposits of sand on the premises, the defendant refused to designate any other place at which sand might be dug, it was held that his refusal was a breach of the contract. *Hurd v. Gill*, 45 N. Y. (6 Hand) 341.

CHAPTER L.

NOTICE OF ACTION OR DEMAND.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition and nature. Notice is the information given of some act done, or the interpellation by which some act is required to be done. The giving notice in certain cases, obviously, is in the nature of a condition precedent to the right to call on the other party for the performance of his engagement, whether his contract were express or implied. Thus in the familiar instance of bills of exchange and promissory notes, the implied contract of an indorser is that he will pay the bill or note provided it be not paid, on presentment at maturity, by the acceptor or maker (being the party *primarily* liable), and provided that he (the indorser) has due *notice* of the dishonor, and without which he is discharged from all liability: Consequently it is essential for the holder to be prepared to prove affirmatively that *such notice was given* or some facts dispensing with such notice. 1 Chitty's Pract. 496. And it may be said generally that wherever the defendant's liability to perform an act depends on another occurrence which is *best known* to the *plaintiff* and of which the defendant is not legally bound to take notice, the plaintiff must prove that due notice was in fact given. *Watson v. Walker*, 23 N. H. 471. So, in cases of insurance on ships a *notice of abandonment* is frequently necessary to enable the assured plaintiff to proceed as for a total loss when something remains to be saved, in relation to which, upon notice, the insurers might themselves take their own measures. And, always where a conditional obligation becomes absolute by the happening of any fact extraneous to, and not named in the contract, it is necessary to aver notice, and, if denied, to prove it; and a plea, denying notice in such case, is good. *Rountree v. Hendrick*, 1 B. Monr. 189; *January v. Duncan*, 3 McLean, 19. But neither demand nor notice, nor other diligence is necessary, when the party to be charged had no right to expect it, and could not have been injured by the omission of it. *Randon v. Barton*, 4 Texas, 289. But the means of

knowledge by which a party is to be affected with notice must be understood to be means of knowledge which are practically within reach, and of which a prudent man might have been expected to avail himself. *Broadbent v. Barlow*, 3 DeG., F. & J. 570; 7 Jur. (N. S.) 479; 30 L. J. Chanc. 569; 4 L. T. (N. S.) 193.

Notice may be actual or constructive. Actual notice exists when knowledge is actually brought home to the party to be affected by it. Constructive notice exists when the party, by any circumstance whatever, is put upon inquiry, or when certain acts have been done which the party interested is presumed to have knowledge of on grounds of public policy. *Bates v. Norcross*, 14 Pick. (Mass.) 224; *Pritchard v. Brown*, 4 N. H. 397; *Scott v. Gallagher*, 14 Serg. & Rawle (Penn.), 333. The recording a deed (*McDermott v. The Board of Police, etc.*, 25 Barb. [N. Y.] 635; 4 Kent's Comm. 182, *n.*); an advertisement in a newspaper, when authorized by statute as part of the process, public acts of government, and *lis pendens*, furnish constructive notice. Notice to an agent is, in general, notice to the principal, where it arises from, or is at the time connected with, the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and if he had not, still the principal, having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal, otherwise the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party. Vol. 1, pp. 231, 232; Story on Agency, § 146, p. 163; Paley on Agency, by Lloyd, 262-266; *Fitzherbert v. Mather*, 1 T. R. 12, 16; *Berkley v. Watling*, 7 Adolph. & Ell. 29; *Bank of U. S. v. Davis*, 2 Hill, 451, 461, 464.

Notice may be written or oral, in many cases, at the option of the party required to give it; but written notice is generally preferable, both as avoiding doubt and ambiguity in its terms, and as admitting more easy and exact proof of delivery. 2 Bouv. Law Dict., p. 237. A waiver of demand and notice upon a promissory note is as effectual after as before the maturity of the note. *Rindge v. Kimball*, 124 Mass. 209.

An omission to do something which ought to be done, in order to the complete performance of a duty imposed upon a public body under an act of parliament, or the continuing to leave any such duty unperformed, amounts to "an act done or intended to be done" within the meaning of a clause requiring a notice of action. *Jolliffe v. Wallasley Local Board*, L. R., 9 C. P. 62; 43 L. J. C. P. 41.

§ 2. When required in actions on contract. In assumpsit, when

the event on which the defendant's duty arises and the plaintiff's right accrues is peculiarly within the knowledge of the plaintiff, the defendant is entitled to notice of the occurrence of the event, before suit. But if the defendant has means of informing himself of the event, from a definite known source, other than by information from the plaintiff, he is not entitled to claim notice from the plaintiff. In other words, the rule is that when a party stipulates to do a certain thing in a certain specific event, which may become known to him or with which he can make himself acquainted, he is not entitled to notice unless he stipulates for it, but when it is to do a thing in an event which lies within the peculiar knowledge of the opposite party, then notice ought to be given him. *Lamphere v. Cowen*, 42 Vt. 175. And see *Bulkley v. Elderkin*, Kirby (Conn.), 188; *Brewster v. Newark*, 11 N. J. Eq. (3 Stockt.) 114. No demand need be proved in a suit on a promise to pay money on demand. *Ross v. Lafayette, etc., R. R. Co.*, 6 Ind. 297; *Pendexter v. Carleton*, 16 N. H. 482. But a suit is a legal demand for money only, and an action will not lie on a contract payable in any thing other than money until after a special demand made. *Wyat v. Bailey*, 1 Morris, 396; *Martin v. Fox, etc., Co.*, 19 Wis. 552; *Frazee v. McChord*, 1 Carter (Ind.), 224; *Martin v. Chauvin*, 7 Mo. 277. So a demand is necessary to support an action on a contract to deliver "corn" or "other farm produce," no place of delivery being stated. *Bradley v. Farrington*, 4 Ark. 532. And see *Kelly v. Webb*, 27 Tex. 368. And where goods are delivered to a commission merchant to sell, but remain unsold, the owner cannot maintain an action for them without a demand and refusal. *Martin v. Webb*, 5 Pike, 73. And see *Bolles v. Stearns*, 11 Cush. (Mass.) 320; *Decker v. Birhap*, 1 Morris, 62. And where a quantity of wheat was delivered to A by D, consigned to B, and A executed a bill of lading for the amount represented to have been shipped, and delivered it to the consignee, and the wheat fell short, and A made up the deficiency, there being no imputation of fraud, it was held that for A to support an action against D for deficiency, a previous demand was necessary to enable D to correct the mistake. *Norris v. Milwaukee Dock Co.*, 21 Wis. 130.

Where a party agrees to perform certain services, in consideration that he shall receive certain goods and merchandise therefor, a demand of the goods and merchandise so to be paid, and a refusal to deliver the same, is indispensable to a right of action therefor. *King v. Kerr*, 4 Chand. (Wis.) 159. A note payable in cash, or in specific articles on demand, is evidence of a promise in the alternative, and a demand of payment, before suit is brought, is necessary, that the maker may elect the mode of payment. *Stevens v. Adams*, 45 Me. 611.

A demand for redelivery is prerequisite to an action to recover a special deposit. *Duncan v. Magette*, 25 Tex. 245. A stockholder must prove a demand before he can maintain an action for a dividend. *Scott v. Central R. R., etc., Co.*, 52 Barb. (N. Y.) 45. A count in a complaint for money had and received, which does not allege a demand, is demurrable. *Reina v. Cross*, 6 Cal. 29. Notice, actual or constructive, is necessary to the validity of proceedings *in rem*. *McKim v. Mason*, 3 Md. Ch. Dec. 186.

In order to sustain an action upon a bank bill, promising payment upon demand, there must be a demand of payment, or circumstances must exist excusing a demand, although the bill is not made payable at any particular place. There is a material difference, in this respect, between a promissory note, and a bank bill issued for the purpose of being circulated as money or its representative. *Thurston v. Wolfborough Bank*, 18 N. H. 391.

If a person receives property as a bailee, that relation will be presumed to continue unless the contrary is shown, and a demand is necessary before bringing an action of replevin; but if the bailee determines the bailment by an act of his own, or if after his decease his administrator inventories or appraises the property as belonging to his intestate, no demand is necessary. *Spencer v. McDonald*, 22 Ark. 466.

In an action of replevin to recover a machine for clipping horses, sold to the defendant upon the condition that he should pay monthly a royalty of one dollar for each horse clipped with it, under penalty of forfeiting the machine, when it was shown that, on the first of July, a demand for the royalties then due and for the machine was made, and that subsequently plaintiff took defendant's check, post-dated several days, for the amount due, which was never paid, and this action was commenced without any return of the check and without any further demand, it was held on appeal that the complaint was properly dismissed; that after the taking of the check a new demand was necessary. *Smith v. Newland*, 9 Hun (N. Y.), 553.

§ 3. **When required in actions for torts.** A *bona fide* purchaser of a chattel, which has been wrongfully taken from the owner, is not liable to an action for the possession without a previous demand. *Wood v. Cohen*, 6 Ind. 455. So, proof of a demand by the vendee and refusal to deliver is necessary to entitle the purchaser of a chattel, which, at the time of the purchase, was in the possession of a third party, to recover against such third party for its wrongful detention. *Howell v. Kroose*, 4 E. D. Smith (N. Y.), 357. So, where a miller fraudulently drew into his boom and manufactured into lumber, logs belonging to other parties, who then transferred their rights to R., it

was held that R. could not maintain an action against him for the lumber without showing a notice and demand after the transfer. *Root v. Bonnema*, 22 Wis. 539. And to maintain an action for the conversion of personal property rightfully in the possession of the defendant, a demand for the return of the property must be proved. *Ryerson v. Kauffield*, 13 Hun (N. Y.), 387.

§ 4. **When not required on contract.** When an obligation to pay is complete, a cause of action at once arises and no formal demand is necessary. *Watson v. Walker*, 23 N. H. 471; *O'Connor v. Dingley*, 26 Cal. 11. And it is unnecessary to put the defendant in default before bringing suit against him if, from the nature of the case, a demand would be of no avail if made. *Rosenthal v. Baer*, 18 La. Ann. 573. *Lex neminem cogit ad vana*. So, a party is not required to demand performance of him who has already expressly refused to perform his obligation. *Abels v. Glover*, 15 La. Ann. 247. And see *Linderman v. Disbrow*, 31 Wis. 465. So, too, where one party to a contract has disqualified himself from performance, the other party can recover for breach of promise, without proof of a demand or a tender. As, where the vendor of chattels sold to the vendee, sells and delivers the same chattels to a third party. *Bassett v. Bassett*, 55 Me. 127; *Smith v. Jordan*, 13 Minn. 264; *Robinson v. Clark*, 20 La. Ann. 384; *Wilstach v. Hawkins*, 14 Ind. 541; *Foster v. Leeper*, 29 Ga. 294. No demand is necessary before commencing an action for property lost or destroyed by a person having it in custody. *Alden v. Pearson*, 3 Gray (Mass.), 342. And if a person advance money or property, or render valuable services in the performance of a contract, void on account of fraudulent representations by the opposite party, he may recover back such money or property and recover the value of such services without a demand. *Malone v. Harris*, 6 Mo. 451. And where an account is payable in goods out of the store of a party, it is not necessary to demand the goods before a suit is brought to recover the amount of the account, if such party has ceased trading before suit brought, and was not situated to pay the goods, and there has been no unreasonable delay on the part of the creditor in calling for them. *Brooks v. Jewell*, 14 Vt. 470.

Where the time for the payment of property is fixed by contract, no demand is necessary. *Campbell v. Clark*, 1 Hemp, 67; *Alexander v. Macauley*, 6 Md. 359; *Crabtree v. Messersmith*, 19 Iowa, 179. And on a contract for services to be paid for "out of the store" of a third person, an action may be maintained without proof of a demand of payment at such store. *Bragdon v. Poland*, 51 Me. 323; Vol. 1, p. 581. The maker of a letter of credit for paper, in these words, "if you will

fill his order, I will be responsible," is liable upon it originally without demand on the bearer and notice to the maker. *Crittenden v. Steele*, 3 G. Greene (Iowa), 538.

In an action for the specific performance of a trust by the execution of a deed, a demand of the deed before suit is only material as affecting the costs. *Jones v. Petaluma*, 36 Cal. 231. But where the owner of land has contracted with a railroad company to convey to it a right of way, and has permitted the company to enter and construct their road without objection, he cannot set up in defense to an action in equity to enforce the contract, failure on the part of the company to pay the one dollar forming a part of the consideration in the agreement, without proving a demand and refusal. *Purinton v. Northern Ill. R. R. Co.*, 46 Ill. 297.

In an action by the owner to recover the value of a large amount of property from a party who was a *bona fide* purchaser from one having no authority to sell, no demand before suit is necessary. *Whitman, etc., Co. v. Tritle*, 4 Nev. 494; *City of Covington v. McNickle*, 18 B. Monr. (Ky.) 262; *Partridge v. Swazey*, 46 Me. 414.

No demand is necessary before bringing suit upon a promise to pay money which does not specify the time of payment when a reasonable time has elapsed. *Niemeyer v. Brooks*, 44 Ill. 77. Nor need a demand be made prior to bringing suit on a note payable on demand. *Fankboner v. Fankboner*, 20 Ind. 62. Or where the time of payment of the note is fixed. *Harbor v. Morgan*, 4 id. 158. And where it is the duty of a party, by contract or otherwise, to remit or apply money in his hands without demand, no demand is necessary before suit against him for such money. *Catterlin v. Somerville*, 22 id. 482; *Ferguson v. Dunn*, 28 id. 58. So no demand is necessary to be made of a clerk for money which he has received officially, and is bound to pay over. *Little v. Richardson*, 6 Jones' Law (No. Car.), 305. And no demand on an agent is necessary where the ground of action is the agent's breach of duty, by which less moneys came to his hands for the principal than otherwise would, and also for the failure of the former to pay over the money actually received. *Dever v. Branch*, 18 Tex. 615. An agreement to return a note will, after a reasonable time, support an action without any demand or refusal. *Henley v. Bush*, 33 Ala. 636. And where goods are received to be sold at certain prices or returned on demand, and the goods are sold and the money received, no special demand need be alleged in an action for the money. *Aliter*, if the action was for a failure to return the goods. *Wyman v. Fowler*, 3 McLean, 467. No demand before bringing suit is necessary where a draft is placed in the hands of brokers for collection,

and is not collected and paid over, or notice of non-payment given within a reasonable time. *Drexel v. Raimond*, 23 Penn. St. (11 Harris) 21; Vol. I, p. 254.

In general, a demand is necessary to support an action by a principal against his agent for money collected by him. It is the duty of an agent to pay over money collected immediately, and if not, the presumption is that payment has been delayed on account of the want of a convenient means of transmitting it to the principal, or some other good cause, and when the lapse of time is such as to rebut this presumption, no demand is necessary. *Bedell v. Janney*, 9 Ill. 193; *Cockrill v. Kirkpatrick*, 9 Mo. 697. And see *Taylor v. Spears*, 6 Ark. 381; Vol. I, p. 254.

A sheriff being about to sell certain property on execution, a claimant of the property gave the sheriff an illegality bond, conditioned that if the illegality was overruled, the obligor would deliver the property to the sheriff. The illegality was overruled, and the property not having been delivered to the sheriff at the time at which the sheriff had advertised to sell the same, an action was brought on the bond. It was held that it was the duty of the obligor to deliver the property in a reasonable time after the judgment of the court setting aside the illegality without being first notified so to do; the event on which he became liable to perform the condition of the bond being one which must be presumed to have been within his knowledge. *Janes v. Horton*, 32 Ga. 245.

In an action upon an agreement for indemnity of plaintiffs against loss upon sale of certain stocks, and to "make good the deficiency, on demand after said sale," it was held, that the action might be maintained without a previous demand. *Halleck v. Moss*, 22 Cal. 266.

When the discharge of a mortgage has been recorded upon an agreement to be performed when such discharge should be made no special notice of the discharge is necessary in order to maintain an action. *Allard v. Lane*, 18 Me. (6 Shep.) 9.

§ 5. **When not required in tort.** To maintain an action for fraud in the purchase of goods, no demand for the price is necessary, fraud being the *gravamen*. *Stewart v. Levy*, 36 Cal. 159. In an action against a bailee for negligence, whereby the property in question was lost, no demand and refusal need be proved. *Warner v. Dunnavan*, 23 Ill. 380. Property wrongfully taken from the owner may be recovered by him without a previous demand. *New York, etc., Co. v. Richmond*, 6 Bosw. (N. Y.) 213. In an action of replevin, it is not indispensably necessary to show a demand upon the defendant to return the property before suit brought. The demand serves only to

establish a conversion or a wrongful detention, and when that can be established without showing a demand, a demand is unnecessary. *Perkins v. Barnes*, 3 Nev. 557. And see *ante*, Vol. 5, pp. 480-484.

In a suit by a mortgagee of personal property, against the mortgagor and a junior mortgagee of the same property, to foreclose the mortgage, and to compel the junior mortgagee to account for a portion of the property which he had converted to his own use, no demand for the property or for an accounting, is necessary before suit. *Woodward v. Wilcox*, 27 Ind. 207.

§ 6. **Notice to officers before suit.** A demand is necessary before suit against a constable for money received by him in his official capacity. *Kivett v. Massey*, 63 No. Car. 240. But in an action against a sheriff for a seizure and conversion of the plaintiff's property, taken under process against a third person, a demand upon the defendant, prior to the bringing of the suit, is not necessary to a recovery, whether the property was taken by mistake or design. *Boulware v. Craddock*, 30 Cal. 190. But if a demand against a sheriff wrongfully levying on property should be necessary to create a cause of action, it need not be made at the time of the levy, in all cases, but within such time as the circumstances of the case render reasonable. *Lynd v. Pickett*, 7 Minn. 184.

And where the surveyors of highways received payment from an inhabitant, of an assessment not made according to statute, but where they intended to act in the performance of the duties of their office, they are entitled to notice of action. *Selmes v. Judge*, L. R., 6 Q. B. 724; 40 id. 287; 19 W. R. 1110; 24 L. T. (N. S.) 905.

When poor law guardians are acting in discharge of their public duty they are entitled to notice of action in respect of any thing done by them in the discharge of such duty, unless it is shown that they have acted *mala fide*; and it is to be assumed, in the absence of proof to the contrary, that they have acted *bona fide*. *Walker v. Nottingham Board of Guardians*, 28 L. T. (N. S.) 308.

In an action against a magistrate for having, in the execution of his office, acted maliciously, and without reasonable and probable cause, he is entitled to notice of action. *Kirby v. Simpson*, 10 Exch. 358; 2 C. L. R. 1286; 18 Jur. 983; 23 L. J. M. C. 165. But see *James v. Saunders*, 4 M. & Scott, 316; 10 Bing. 429. He is entitled to notice of action when he acts as a magistrate, though what he does is not strictly within the scope of his office. *Bird v. Gunston*, 2 Chit. 459; 4 Dougl. 275. So, where he acts upon a subject-matter of complaint, over which he has authority, but which arises out of his jurisdiction. *Prestidge v. Woodman*, 2 D. & R. 43; 1 B. & C. 12; *Graves v.*

Arnold, 3 Campb. 242. So, if he does an unjustifiable act, but really believes that he has a right to do the act, in his capacity of justice, he is entitled to notice of action. *Wedge v. Berkley*, 6 A. & E. 663; W., W. & D. 271; 1 N. & P. 665. And see *Jones v. Williams*, 5 D. & R. 654; 3 B. & C. 762; 1 C. & P. 459, 669; *Briggs v. Evelyn*, 2 H. Bl. 114. In an action against a person for the penalty given for acting as a magistrate without a proper qualification, the defendant is not entitled to notice of action. *Wright v. Horton*, Holt, 458; 1 Stark. 400; 2 Chit. 25; 6 M. & S. 50.

A constable who takes a party into custody, *bona fide*, believing that he has committed an offense, is entitled to notice of action, although he did not see the trespass committed, and there is no proof of any complaint made to him by the owner of the property injured. *Ballinger v. Ferris*, 2 Gale, 111; 1 M. & W. 628. An excise officer is entitled to notice before an action is brought against him for an act not warranted by his official capacity, if done *bona fide*, in the supposed execution of his duty. *Daniel v. Wilson*, 5 T. R. 1. And see *Arnold v. Hamel*, 9 Exch. 405; 23 L. J. Exch. 137. Notice is necessary in an action for money had and received against an excise officer, to recover duties received by him after the act imposing them was repealed, and he had paid them over to his superior. *Greenway v. Hurd*, 4 T. R. 553.

§ 7. **Persons acting under statutes.** Where a statute provides that before an action is commenced against any person for any thing done in pursuance of the statute, notice of action shall be given, in order to entitle a defendant to such notice, on the ground that he "honestly believed in the existence of those facts, which, if they had existed, would have afforded a justification under the statute," the facts of the case must at least be such that he could so honestly believe, and such as to afford evidence to go to the jury that he did so. *Leete v. Hart*, L. R., 3 C. P. 322; 37 L. J. C. P. 157; 16 W. R. 676; 18 L. T. (N. S.) 292; *Heath v. Brewer*, 15 C. B. (N. S.) 803; 9 L. T. (N. S.) 653. If the party acted under a reasonable though mistaken persuasion, from appearances, that the facts were such as made his proceedings justifiable by the statute, he is entitled to protection, though the real facts were such that the statute clearly affords no justification. *Cann v. Clipperton*, 10 A. & E. 582; 2 P. & D. 560; *Roberts v. Orchard*, 2 H. & C. 769; 33 L. J. Exch. 65; 9 L. T. (N. S.) 727; 12 W. R. 253. And see *Booth v. Clive*, 10 C. B. 827; 2 L. M. & P. 283; 15 Jur. 563; 20 L. J. C. P. 151; *Arnold v. Hamel*, 9 Exch. 405; 2 C. L. R. 499.

§ 8. **Notice, how given.** Whatever is sufficient to put a party up-

on inquiry, is sufficient to charge him with notice, and a want of notice of a fact, resulting from a failure to use proper diligence to ascertain it, furnishes no protection to a party. *McGehee v. Gindrat*, 20 Ala. 95; *Powell v. Haley*, 28 Tex. 52; *Gibbes v. Cobb*, 7 Rich. Eq. (So. Car.) 54; *Carr v. Hilton*, 1 Curtis' C. C. 390. But, a party thus put on inquiry is to be allowed a reasonable time to make it, before he is affected with notice. *Id.* And if a statute requires a demand in writing, it must be by leaving a written demand, not by reading a demand. *Seem v. McLees*, 24 Ill. 192. The institution of a suit on a note, and the service of a summons are a "demand in writing," sufficient to charge the party for whose benefit it was given, and who is held to pay it, after a written demand has been made. *Pendexter v. Carleton*, 16 N. H. 482. The demand in writing for the possession of real estate, claimed in under the statutes of Arkansas, is not required to be in any particular form, and it is sufficient if it direct the attention of the defendant to the place demanded, so that he may know what premises are demanded. *Farr v. Farr*, 21 Ark. 573.

In equity, whatever information is sufficient to put a purchaser upon inquiry is sufficient notice of prior liens upon the property transferred to him. *Ringgold v. Bryan*, 3 Md. Ch. Decis. 488.

A refusal, in writing, to execute a conveyance, is evidence of a demand of such conveyance. *Goodale v. West*, 5 Cal. 339. Proof that a party professing to be an innocent purchaser was informed, previous to the purchase, that a person other than the vendor had a claim on the property, is sufficient proof of notice, as it was then his duty to make inquiry. *Mayfield v. Averitt*, 11 Tex. 140. Showing a bill to a debtor, asking him to pay it and his refusal to do so, are sufficient evidence of a demand of payment to be submitted to a jury. *People's, etc., Ins. Co. v. Clark*, 12 Gray (Mass.), 165. Where the plaintiff went to the house of the defendant and requested a settlement for work done, but was driven from the premises by the defendant, with threats of bodily injury, it was held that this was equivalent to a demand by the plaintiff, and a denial on the part of defendant of all liability to pay the plaintiff for his labor, and that the plaintiff had a right so to regard it. *Spencer v. Storrs*, 38 Vt. 156. A demand by an administrator for damages, which have been awarded for laying out a highway, over his intestate's land, is sufficient, if its purport is understood by the parties on whom it is made, and they know the office he holds, although no formal explanation is made. *Clough v. Unity*, 18 N. H. 75. A demand of payment of certain claims, which have been taken up at the request of the defendant, and a general refusal of payment, without any cause assigned, is good, notwithstanding it in-

cluded a claim which the defendant was not bound to pay, and notwithstanding no precise sum was named as the amount due. *Kimball v. Bellows*, 13 N. H. 58. So, in an action to recover from the stakeholder, at a horse-race, the whole amount of the stakes, where the plaintiff was held entitled to recover only his own stakes, a demand of the whole sum was held to be sufficient as a demand of the plaintiff's own stakes. *Carr v. Martinson*, 1 Ellis & E. 456.

A demand made by one assuming to act for the town, if afterward ratified by the town, by bringing the action or by adopting it after it has been brought in its name, will be sufficient, provided that a payment made to the party demanding at the time would have discharged the indebtedness to the town. *Grafton v. Follansbee*, 16 N. H. 450. And where a constable, who had attached property upon mesne process, had removed from the State, it was held a sufficient demand of property attached to charge it upon the execution, to demand it of the selectmen and town agent of the town, and of one of the persons whose accountable receipt the constable had taken for the property. *Austin v. Burlington*, 34 Vt. (5 Shaw) 506.

In England, in construing notices of action under the various statutes requiring them, the court will not subject them to too nice and narrow an examination, the object being that they should be plain and intelligible to plain men. *Jones v. Nicholls*, 1 New Sess. Cas. 524; 13 M. & W. 361; 2 D. & L. 425; 8 Jur. 989; 14 L. J. Exch. 42; *Hollingworth v. Palmer*, 4 Exch. 267; *Agar v. Morgan*, 2 Price, 126. And a notice is not vitiated by being in the form of a declaration, and unnecessarily ample, if it expresses the cause of action with sufficient clearness. *Gimbert v. Coyney*, McClel. & Y. 469. And see *Robson v. Spearman*, 3 B. & A. 493; *Jones v. Bird*, 1 D. & R. 497; 5 B. & A. 837.

In an action against a justice of the peace for an act done within his jurisdiction, the notice of action must state that the act was done maliciously, and without reasonable or probable cause, or it will not be sufficient. *Taylor v. Nesfield*, 3 El. & Bl. 725; 2 C. L. R. 1312; 18 Jur. 747. It must state the substantial cause of action intended to be relied on clearly and explicitly, and in such a manner as will not be likely to mislead the justice of the peace, and so probably prevent his tendering amends. *Id.* A notice of action does not explicitly and clearly contain the cause of action, if it omits to mention the place where the act complained of was done. *Martins v. Uppcher*, 1 D. (N. S.) 555; 2 G. & D. 716; 3 Q. B. 662. If a notice of action against a magistrate, for wrongful distress under a conviction, states the person

to whom the warrant is directed, it must state it correctly. *Aked v. Stocks*, 4 Bing. 509; 1 M. & P. 346.

Notice is actual when it is directly or personally given to the party to be notified, and constructive when the party, by circumstances, is put upon inquiry, and must be presumed to have had notice, or by judgment of law is held to have had notice. *Jordan v. Pollock*, 14 Ga. 145. As to that which a party might have known, by the use of proper diligence, he is held to the same legal responsibility in all respects as if he actually knew. *Cook v. Garza*, 13 Tex. 431. But notice of an intention to execute a deed is not notice of the contents of the deed, as executed. *Ponder v. Scott*, 44 Ala. 241. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might, by prudent caution, have obtained the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence. *Ware v. Egmont*, 4 D. M. & G. 460; 31 Eng. Law & Eq. 89. What is constructive notice that a party who offers to sell property holds it as a trustee is explained in *Coy v. Coy*, 15 Minn. 119.

Where one is bound in equity to execute a deed conveying certain premises, notice of such obligation to the attorney of the attaching creditor of the party, before such attorney causes the premises to be attached in a suit in favor of the creditor against the party, as his property, is notice to such party. *Vermont Mining, etc., Co. v. Windham Co. Bank*, 44 Vt. 489.

When a demand is necessary before bringing suit, if, when a demand is made, a specific objection is made as a reason for not complying with the demand, all other objections, which, if made, might have been readily obviated, are waived. *Bartlett v. Adams*, 43 Ind. 447. One who has undertaken to "give notice" within a specified number of days, does not comply with his obligation by depositing the notice in the post-office upon the last of the days allowed, too late for it to go in the mail for that day. *Field v. Mann*, 42 Vt. 61.

When the authority of an agent making a demand is not questioned at the time, the objection, that the authority was not shown when the demand was made, cannot be taken at the trial at which the demand is offered in evidence. *Baxter v. McKinlay*, 16 Cal. 76; *Barlow v. Brock*, 25 Iowa, 308; *Poer v. Brown*, 24 Texas, 34. But although the authority to make the demand need not be shown at the time of the demand unless it is called for, yet to constitute a legal demand, it must appear on the trial that the person who made it was authorized to do so by the principal. *Taylor v. Spears*, 6 Ark. 381. A demand by one standing in *loco parentis*, and

having the care of the property, is enough. *Newman v. Bennett*, 23 Ill. 427. The demand should be made before suit brought. But where a bill in equity has been filed in vacation and process issued, and a demand afterward, but before service made upon the defendants, with the purpose of making service only in case of refusal, such demand is sufficient. *Leach v. Noyes*, 45 N. H. 364.

Where an action of assumpsit was brought on a guaranty under seal, it was held in a subsequent action of covenant, that the former action, though there was a nonsuit, amounted to a demand in the strongest form. *Nixon v. Long*, 11 Ired. 428.

Where an instrument has been recorded, the recording of which was not required by statute, the record is no legal notice of its contents. *Brown v. Budd*, 2 Carter (Ind.), 442.

§ 9. **How pleaded.** A defendant cannot avail himself of a want of a demand unless it is set up as a defense in the answer accompanied with a tender of the amount due. *State v. Grupe*, 36 Mo. 365; *Marrionneaux v. Downs*, 19 La. Ann. 208; *Davey v. Warne*, 14 M. & W. 199; 15 L. J. Exch. 253; *Law v. Dodd*, 1 Exch. 845; 17 L. J. M. C. 65. So where a plaintiff filed a bill to restrain a nuisance without giving the defendants notice of his intention to take proceedings; and they by their answer justified the nuisance and insisted on their legal rights, it was held that the nature of the answer precluded the defendants from objecting to want of notice, and entitled plaintiff to the costs of the suit. *Attorney-General v. Hackney Board of Works*, 44 L. J. Chanc. 545.

CHAPTER LI.

PAROL DISCHARGE OF SEALED CONTRACTS.

ARTICLE I.

GENERAL RULES.

Section 1. Definition and nature. There can be no discharge by parol of a sealed executory contract (*Coe v. Hobby*, 72 N. Y. [27 Sick.] 141); but after a breach of a sealed contract, a right of action may be waived or released by a new parol contract in relation to the same subject-matter, or by any valid parol executed contract. *Dela-croix v. Bulkley*, 13 Wend. 71; *Sinard v. Patterson*, 3 Blackf. 353. It has been supposed that some cases in New York have established a contrary doctrine, but on closely examining such cases it will be seen that the extent to which they have gone is that after a breach of a sealed contract the parties to it may discharge any liability upon it by entering into a new agreement in relation to the same subject-matter, which new agreement is a valid contract, founded upon a sufficient consideration. *Keeler v. Salisbury*, 27 Barb. 485; 33 N. Y. (6 Tiff.) 648. See *Dearborn v. Cross*, 7 Cow. 48; *Lattimore v. Harsen*, 14 Johns. 330; *Hasbrouck v. Tappen*, 15 id. 200; *Fleming v. Gilbert*, 3 id. 530.

Parties to a written contract not under seal may, after its execution, dissolve or waive, or discharge, or qualify the contract or any part of the same by a new verbal contract, and such discharge, etc., if made before breach, will be a good defense in a suit on the contract. *Rhodes v. Thomas*, 2 Carter (Ind.), 638; *Buel v. Miller*, 4 N. H. 196.

§ 2. **What is a valid discharge.** See preceding section.

Covenants for the sale of land may be discharged by a parol contract, upon good consideration. *Reed v. M'Grew*, 5 Ham. (Ohio) 380.

§ 3. **What is not a valid discharge.** See above, section 1.

A written contract for the purchase of land, which has been partly executed by entry and improvements, cannot be rescinded by a verbal agreement, and a surrender of the instrument; the vendee remaining

in possession under a verbal agreement to occupy as tenant. *Cravener v. Bowser*, 4 Penn. St. 259. And see *Espy v. Anderson*, 14 Penn. St. (2 Harris) 308.

§ 4. **How interposed.** Like any other affirmative defense, the facts relied upon as constituting the discharge should be particularly set forth in the plea or answer.

CHAPTER LII.

PAYMENT.

ARTICLE I.

OF PAYMENT IN GENERAL.

Section 1. Definition and nature. Payment, in its most general acceptation, is the fulfillment of a promise, or the performance of an agreement. In a more restricted sense it is the discharge in money of a sum due. 2 Bouv. Dict. 311. See *Bloodworth v. Jacobs*, 2 La. Ann. 24; *Gernon v. M'Can*, 23 id. 84. And it is a well-settled doctrine of the law, that where a defendant can show, by legal evidence, that he has properly and legally paid the plaintiff's demand, this will always constitute a perfect defense to an action for its recovery. Debts are usually paid in money or the common and valid currency in daily use. See *Moody v. Mahurin*, 4 N. H. 296; *Lefferman v. Renshaw*, 45 Md. 119. But there may be legal payments besides those made in money, if the parties so agree, or if the circumstances are such as to authorize a court to declare a given transaction a payment of a debt or demand. 1 Wait's Law & Pr. 1063. It has therefore been held, that a payment is the discharge of an obligation by a performance according to its terms or requirements; that is, if the obligation be for money, the payment is made in money; if for merchandise or labor, a delivery of the merchandise or a performance of the labor is payment; or, if for the erection of a building, performance according to the terms of the contract is payment. *Tolman v. Manufacturers' Ins. Co.*, 1 Cush. 73. And see *Dodge v. Swazey*, 35 Me. 535. At any rate, in order that a payment may have the effect to extinguish a debt, it must be made by a person who has a right to make it, to a person who is entitled to receive it, in something proper to be received both as to kind and quality, and at the appointed place and time (2 Bouv. Dict. 311); and the thing delivered must be received for the purpose of extinguishing the debt (*Kingston Bank v. Gay*, 19 Barb. 459); and so delivered and received in payment as to leave nothing further to be done in relation thereto between the parties. If left for subsequent adjustment and application, it is not payment. *Strong v. M'Connell*, 10 Vt. 231. A voluntary payment creates no indebtedness and cannot

be recovered back, though the whole debt be afterward collected. *Id.*; *Gibson v. Bingham*, 43 Vt. 410; S. C., 5 Am. Rep. 289; *Town of Ligonier v. Ackerman*, 46 Ind. 552; S. C., 15 Am. Rep. 323; Vol. 4, pp. 476, 482.

§ 2. **What amounts to a payment.** As a general rule, payment of part of a debt is no satisfaction of the whole debt, even where the creditor agrees to receive a part for the whole, and actually gives a receipt to that effect. *Nelson v. Weeks*, 111 Mass. 223; *Rea v. Owens*, 37 Iowa, 262. But there were always exceptions to this rule; as, if a creditor accepts a part of his debt before the whole is due in satisfaction of the whole; or at a different place from where it was payable; or, if the whole of the money be due and there is an agreement to accept something else, though of less value, in satisfaction of the debt. Vol 6, pp. 411, 419. In such cases the agreement cannot be said to be without consideration, and that would be a bar to a recovery of the residue. *Arnold v. Park*, 8 Bush (Ky.), 3. And see Vol. 6, pp. 411, 419, tit. *Accord and Satisfaction*. But an agreement to substitute any other thing in lieu of the original obligation is void unless actually carried into execution and *accepted* as satisfaction. *Id.*; *Smith v. Foster*, 5 Oreg. 44; *Bragg v. Pierce*, 53 Me. 65.

When a mortgagee of chattels takes possession of the mortgaged property, upon a forfeiture of the mortgage condition, this will constitute a payment of his debt, if the property is of a value equal to the debt, and no other act is necessary to discharge the debt. *Case v. Boughton*, 11 Wend. 106. So where a mortgagee of chattels, after forfeiture, sells a part of the property by virtue of the mortgage, for a sum sufficient to pay his debt, with interest, costs and expenses, this is equivalent to a payment of his debt, and his title to the remaining chattels is extinguished. *Charter v. Stevens*, 3 Denio, 33. And see *Bragelman v. Daue*, 69 N. Y. (24 Sick.) 69. And where the mortgagee in possession of lands received certain sums for land damages for lands taken by a railroad company, and by the State, it was held that such sums should be deemed payments on the mortgage, and the ordinary rule of computation of interest applicable to mortgages should be adopted. *Bennett v. Cook*, 2 Hun (N. Y.), 526; S. C., 5 N. Y. Sup. Ct. (T. & C.) 134. A devise of real estate, if intended as a satisfaction for a debt or claim, and accepted by the devisee, will operate as a payment of such demand. *Rose v. Rose*, 7 Barb. 174. And an absolute conveyance of real estate, made to secure a debt in fact, is payment *pro tanto*, of the debt. *Fales v. Reynolds*, 14 Me. 89. And it is a general rule, that where collateral security is received for a debt, with power to convert the security into money, and the proceeds of the

security equal or exceed the amount of the debt, the debt is *de facto* paid. *Hunt v. Nevers*, 15 Pick. 500. So, if a debtor has conveyed property to his creditor, in trust to sell and satisfy the debt, and the latter sells the property and holds the proceeds, it is a payment of the debt. *Dismukes v. Wright*, 3 Dev. & Bat. (No. Car.) L. 78. So, work done under an agreement to apply it to the payment of a note is payment for so much, unless by a subsequent agreement it is otherwise applied. *Moore v. Stadden*, Wright (Ohio), 88. And if A agrees to take B's debt against a third person, as payment *in presenti*, it is a virtual purchase of B's claim, and an agreement to accept it, as payment *pro tanto* upon A's claim against B. *Hayden v. Johnson*, 26 Vt. 768. And where chattels, upon which C had a lien, were sold by A to B, and B, in order to obtain the chattels, was compelled to pay C's claim, the sum thus paid was held to be a payment *pro tanto* to A. *Part-ridge v. Dartmouth College*, 5 N. H. 286.

Where money due on a contract is applied by the party owing it, to purposes authorized by the creditor, the expenditure is a payment, and extinguishes the demand partially or totally, according to the amount so applied. *Brady v. Durbrow*, 2 E. D. Smith (N. Y.), 78. So, an arrangement between the payee of a note and the maker, assented to by the partner of the latter, to apply in payment of the note a certain debt owing by the payee to the maker and his partner, is an *executed*, not an *executory* contract, and operates as an immediate payment of the note to the extent of the debt. *Davis v. Spencer*, 24 N. Y. (10 Smith) 386. See, also, *Eaves v. Henderson*, 17 Wend. 190. And where a person performs services for A at the request of B, and the laborer charges the services to B in the first instance, B is then the debtor; and such charge is, as between A and B, equivalent to a payment of that amount to the use of A. *Conway v. Conway*, 3 Sandf. (N. Y.) 650.

A payment by a debtor of the amount of his debt, to the credit of the creditor, at a particular bank, at the request of the creditor, is a good payment, and where both parties keep an account at the same bank, the debtor's debt is discharged as soon as the amount is transferred by the bank from the debtor's to the creditor's account, because such transfer is equivalent to payment, and the debt is extinguished, although no money passes; and if the bank fails, the loss will fall upon the creditor and not upon the debtor, and such failure will not revive the liability of the debtor. *Bodenham v. Purchas*, 2 B. & Ald. 47; *Bolton v. Richard*, 6 Term R. 139; *Eyles v. Ellis*, 4 Bing. 112; 2 Wait's Law & Pr. 1064. But a mere *promise* to make a transfer of the credit from one account to another is not equivalent to an *actual* transfer. *Id.*; *Pedder v. Watt*, 2 Chit. 619.

The acceptance of a note of forty dollars in satisfaction of a note of sixty dollars, and the simultaneous surrender of the larger note was held to be a full discharge thereof. *Draper v. Hitt*, 43 Vt. 439; S. C., 5 Am. Rep. 292. But where the larger notes were not taken up, it was held that there is no consideration in law for a promise by a creditor that a part of the debt shall be received in satisfaction of the whole. *Oberndorfer v. Union Bank*, 31 Md. 126; 1 Am. Rep. 31. See Vol. 6, pp. 557-562. Where one agreed to sell real estate for a specified sum in gold, or its equivalent in currency, his subsequent acceptance of the purchase-money in currency, and the delivery of the deed, was held to be a waiver of compliance with the terms as to gold. *Lefferman v. Renshaw*, 45 Md. 119. And a note payable "in gold coin or the equivalent thereof in United States legal tender notes," is discharged by the payment of legal tender notes, dollar for dollar. *Killough v. Alford*, 32 Tex. 457; S. C., 5 Am. Rep. 249. And a ground rent reserved in "lawful silver money of the United States, each dollar weighing 17 dwt. 6 grs., at least," can be paid in gold coin. *Morris v. Bancroft*, 9 Phil. (Penn.) 277.

The acceptor of a bill of exchange for one hundred pounds, drawn in London and payable in Boston, may pay in treasury notes at the rate of \$4.84 for each pound. *Cary v. Courtenay*, 103 Mass. 316; 4 Am. Rep. 559.

A payment which is good by the law of the country where it is made will be valid everywhere. *Ralli v. Dennistoun*, 6 Exch. 483.

§ 3. Who to make payment. A payment by the debtor himself will always be made by the proper person. And in the absence of contrary proof, it will be presumed that payment was made by the party bound, and not by another. *Amis v. Merchants' Ins. Co.*, 2 La. Ann. 594. Where there are several debtors, a payment by one of them will be a payment for all. *Thorne v. Smith*, 10 C. B. 659. See, also, *Davis v. Barkley*, 1 Bailey (So. Car.), 141; *Boggs v. Lancaster Bank*, 7 Watts & Serg. (Penn.) 331. And a payment may be made in the same manner that any other lawful act may be performed by an agent. See Vol. I, tit. *Agency*. So, if a creditor applies to his debtor for payment, and he, by a written or verbal order, requests another to pay, who, whether bound to do so or not, does pay, it is a payment of the debt, and discharges the claim of the creditor (*Tuckerman v. Sleeper*, 9 Cush. 177), if the money is accepted for that purpose. *Martin v. Quinn*, 37 Cal. 55. See, also, *Logan v. Williamson*, 3 Ark. 216. And it has been held that the payment of a debt by one not a party to the contract, is an extinguishment of the demand, whether made with the assent of

the debtor or not. *Harrison v. Hicks*, 1 Port. (Ala.) 423. But see *James v. Isaacs*, 12 C. B. 791; *Cook v. Lister*, 13 C. B. (N. S.) 543.

If the treasurer of a town makes a payment upon a debt due from the town, it will be presumed, in the absence of all proof to the contrary, that the payment was made with the approbation of the town. *Sargeant v. Sunderland*, 21 Vt. 284. And see *Edson v. Sprout*, 33 id. 77. Payment by an indorser, pending suit against maker and indorser jointly, is a bar to further prosecution of the suit against the maker, even for the indorser's benefit. *Griffin v. Hampton*, 21 Ga. 198. And payment by the maker of a promissory note, not negotiable, to the payee, without notice of an assignment, is good against the assignee. *Heath v. Powers*, 9 Mo. 774. See Vol. 1, tit. *Bills and Notes*.

A deposit of money, with instructions to the officers of the bank to pay certain notes, which they refuse to do, will not place the money subject to the order or control of the holder of the notes, and therefore will not operate as payment. *Pease v. Warren*, 29 Mich. 9; 18 Am. Rep. 58.

And where the holder of a second mortgage took up a note which was secured by a first mortgage on the same premises, it was held that he did not thereby pay the note or release the maker and indorser from their obligation to pay. *Mattison v. Marks*, 31 Mich. 421; S. C., 18 Am. Rep. 197.

§ 4. **To whom payment made.** A payment to the creditor himself will, of course, discharge the debt. And the debtor must search out his creditor to pay him. *Sanders v. Norton*, 4 T. B. Monr. (Ky.) 464. And the real person to whom a payment is due is not barred from a recovery thereof by the fact that the custodian of the money has paid it to a person simulating the payee. *People v. Smith*, 43 Ill. 219; *Graves v. American Exchange Bank*, 17 N. Y. (3 Smith) 205. And see *Colson v. Arnot*, 57 N. Y. (12 Sick.) 253; S. C., 15 Am. Rep. 496; *Robinson v. Weeks*, 6 How. (N. Y.) 161; S. C., 1 Code R. (N. S.) 311. Payment of a partnership debt to one of several partners will be sufficient to discharge the partnership debt. *Bulkley v. Dayton*, 14 Johns. 387. And see Vol. 5, p. 105, tit. *Partnership*. So, a payment to one of several executors, will be a valid payment of the debt. *Can v. Read*, 3 Atk. 695; 1 Wait's Law & Pr. 1065. And generally, payment of a whole debt, to one of several obligees or creditors, is payment to all. *Morrow v. Starke*, 4 J. J. Marsh. (Ky.) 367. A note payable to two creditors jointly, may be made by paying either, and when paid to either, a mortgage to secure its payment is extinguished. *Wright v. Ware*, 58 Ga. 150. But a payment by a bank to one of

several persons who have jointly made a deposit, will not discharge the bank from the claims of the other depositors, unless they authorized the payment. *Innes v. Stephenson*, 1 Moo. & Rob. 145; *Stone v. Marsh*, Ry. & Moo. 364.

Payment to an agent, in the ordinary course of business, is a valid payment to the principal, unless the latter has countermanded the agent's authority, and given due notice thereof to the party paying, before the payment was made. *Favenc v. Bennett*, 11 East, 36; *Renard v. Turner*, 42 Ala. 117; *McCrory v. Ashbaugh*, 44 Mo. 410. And a creditor who has once authorized payment to his agent, cannot revoke that authority, if the debtor has given such a pledge to pay pursuant to the authority as would bind him in a court of law. *Hodgson v. Anderson*, 3 Barn. & C. 842; S. C., 5 Dowl. & Ry. 735. But an agent who is authorized to receive a payment in money, cannot bind his principal by receiving goods instead of money. *Howard v. Chapman*, 4 Carr. & P. 508; *Mudgett v. Day*, 12 Cal. 139. And if a creditor employs an agent to receive money of a debtor, and the agent instead of receiving money writes off a debt due from himself to the debtor, the latter is not thereby discharged. *Underwood v. Nicholls*, 17 C. B. 239; *Bartlett v. Pentland*, 10 Barn. & Cr. 760; *Bostick v. Hardy*, 30 Ga. 836.

Where the payee of a note leaves it with a bank for collection, the bank becomes his agent for the reception of the money, and payment at the bank discharges the maker, although the bank neglects to transfer the amount to the payee. *Smith v. Essex County Bank*, 22 Barb. 627. And it is held that payment made to a person found in a merchant's counting-house, in possession of the merchant's account books, and apparently intrusted with the conduct of the business, is a good payment to the merchant himself, although the party receiving the money has in fact no authority to receive it, and is not in his employment. In such a case the debtor has a right to suppose that the merchant has the control of his own premises, and that he will not permit persons to come there and intermeddle with his business without his authority. *Kirton v. Braithwaite*, 1 Mees. & W. 310; *Wilnot v. Smith*, 3 Carr. & P. 453. But if a son receives payment of a note not due, in the absence, and contrary to the order, of his father, and surrenders the note, the father may maintain trover for the note. *Kingman v. Pierce*, 17 Mass. 247. So, a mortgage debtor paid a sum of money to the son of the mortgagee's agent, to be applied on the mortgage. The agent had authority to receive money for the mortgagees, and the son had for a number of years acted as his clerk or agent in the business of the agency, and had sometimes

carried money collected to the mortgagees, but had no authority as their agent. Under this state of facts it was held that the debtor's payment to him was not payment to the mortgagees' agent, and that the promise of the agent that he would allow such payment was not binding on the mortgagees. *Lewis v. Ingersoll*, 3 Abb. Ct. App. 55; S. C., 1 Keyes, 347. And see *Fellows v. Northrup*, 39 N. Y. (12 Tiff.) 117. And where it was sought to establish an authority in a clerk, to bind a plaintiff by the receipt of depreciated currency in payment of a judgment, it was held that it must be shown, either that the receipt was expressly authorized by the plaintiff, or that the plaintiff had done acts from which such an authority might fairly be implied. *Purvis v. Jackson*, 67 No. Car. 474.

Payment to a creditor's wife will not be a good payment, unless she was his agent, either by express authority, or by the usual course of business. *Thrasher v. Tuttle*, 22 Me. 335; *Offley v. Clay*, 2 Man. & Gr. 172. During the absence of an attorney from home his wife received and opened a letter addressed to him containing a draft payable to his order for collection. The drawee paid to her the draft. It did not appear that she had any general or special authority to act for her husband in his professional matters, but he had placed some individual claims for collection in the hands of the drawee, and instructed him to pay over to her any moneys that should come to his hands for himself; and it was held that she had no authority to receive payment of the draft, and that the drawee was not discharged. *Day v. Boyd*, 6 Heisk. (Tenn.) 458.

If a third person contracts with a journeyman for the performance of work, without the name of his employer being disclosed, and, supposing him to be the party entitled to receive it, pays him therefor, he is discharged from all liability to the employer. *Copeland v. Touchstone*, 16 Ala. 333.

Payment of a subscription made directly to the party beneficially interested, is a good defense to an action to recover the subscription, brought by the agent or collector named in it to receive payment. *Erwin v. Lapham*, 27 Mich. 311.

And payment of the amount of a note, the property of the estate of a decedent, made to his widow, the sole legatee of the estate during life or widowhood, when the estate was not in debt, and there was no pending administration, was held to be valid. *Hannah v. Lankford*, 43 Ala. 163.

The assignee of a note is bound by a payment made thereon to the obligee, before the obligor had received notice of the assignment. *Bartholomew v. Hendrix*, 5 Blackf. (Ind.) 572; *Gibson v. Pew*, 3 J. J.

Marsh. (Ky.) 222. And, an assignment, before maturity, of a joint and several promissory note, made by the payee to one of the makers, constitutes a payment. *Gordon v. Wansey*, 21 Cal. 77. But, payment of a promissory note not negotiable, by the maker to the payee, after notice of its assignment, or suit brought, in the name of the payee for the use of the assignee, is at the risk of the maker. *Hickok v. Labus-sier*, 1 Morr. (Iowa.) 115. See *Johnston v. Lewis*, 1 A. K. Marsh. (Ky.) 401. And payment made by the maker to the payee or indorser of a negotiable promissory note, after it has been protested for non-payment, taken up by the latter, and transferred by him to a creditor as collateral security for a larger debt, such payment being made without knowledge of the transfer, is held to be no defense to an action brought on the note by the transferee and holder against the maker. *Davis v. Miller*, 14 Gratt. (Va.) 1.

A payment by a debtor to an administrator duly appointed is valid, and a bar to an action to compel a second payment, although the supposed intestate is alive at the time, and letters of administration are subsequently revoked for this reason. *Roderigas v. East River Saving Institution*, 63 N. Y. (18 Sick.) 460; S. C., 20 Am. Rep. 555.

Where money is due on a written security, such as a bill or bond, it is the duty of a debtor if he pays to an agent, to see that such agent is in possession of the security; otherwise he will not be discharged unless the money reaches the principal. *Howard v. Rice*, 54 Ga. 52. And see *Wheeler v. Guild*, 20 Pick. 545. A note was given to an attorney for collection, and he authorized the debtor to send the money to him by a third person. The debtor gave the money to such person, who did not have the note, and who appropriated the amount to his own use. And it was held that such payment did not discharge the debtor, and that he was still liable for the amount of the note in a suit by the owner thereof. *Dickson v. Wright*, 52 Miss. 585; S. C., 24 Am. Rep. 677.

Where a statute directs payment to the constable, payment to a justice, at the request of the constable, is sufficient. *Berrel v. Davis*, 44 Mo. 407.

§ 5. **Time of making payment.** When no specific time is fixed in a contract for the payment of money, it is payable on demand. *Bank of Columbia v. Hagner*, 1 Pet. (U. S.) 455. A debt, acknowledged to be due, without mentioning any time of payment, is payable immediately. *Payne v. Mattox*, 1 Bibb (Ky.), 164. See, also *Cotton v. Reavill*, 2 id. 99; *Kendal v. Talbot*, 1 A. K. Marsh. (Ky.) 321. Notes payable on specified days cannot be sooner paid, without the consent of the payee. *County Commissioners v. Fox*, Morr.

(Iowa) 48; *Ebersole v. Redding*, 22 Ind. 232. Notes will not be presumed to have been paid before they become due. Id. A promise to pay "on or before" a day named, states the time for payment with sufficient certainty for the purposes of a promissory note. A note so drawn is due on the day named, and not before; the maker may pay it sooner if he chooses, but this would only be a payment in advance of his legal liability. *Mattison v. Marks*, 31 Mich. 421; S. C., 18 Am. Rep. 197.

Whenever it is incumbent upon the holder of a bill or exchange to present it at the proper time, and he neglects to do so, he will lose not only his remedy upon the bill, but also upon the consideration or debt in respect of which it was given or transferred. *Adams v. Darby*, 28 Mo. 162.

Money paid on the Lord's day, and retained afterward, discharges a debt. *Johnson v. Willis*, 7 Gray, 164. See tit. *Illegality*, ante, p. 114. If payment is to be made within a certain time after a day named, that day is to be excluded in computing the time. *Campbell v. International, etc., Ass. Society*, 4 Bosw. (N. Y.) 298. See tit. *Limitations*, ante, p. 223.

§ 6. **Place of making payment.** A person who has bound himself to make a payment on a given day, is bound also to seek for his creditor on that day in order to make the payment, and the creditor is not bound to seek for him in order to demand payment. *Sanders v. Norton*, 4 T. B. Monr. (Ky.) 464. Yet, while this is so, if an employer has an established place where he pays those employed, and where he has reason to expect they will call for their hire, mere neglect to pay elsewhere, without evidence of a demand and refusal, will not justify those employed in abandoning the contract of service. *Dockham v. Smith*, 113 Mass. 320; S. C., 18 Am. Rep. 495. And where the payee of a money obligation, specifying no place of payment, is out of the State, where the payment is to be made, the debtor is not obliged to follow him, but readiness within the State will be as effectual as actual payment to save a forfeiture. *Hale v. Patton*, 60 N. Y. (15 Sick.) 233; S. C., 19 Am. Rep. 168.

Where it is agreed by the parties to a note that the note may be paid at a certain store, and a part of the amount is left at such store by the maker, which act is ratified by the payee with full knowledge of the circumstances, it will be deemed a payment. *Ingalls v. Fiske*, 34 Me. 232.

Under a pledge between parties resident in a foreign country, to secure a loan made there in the currency of that country, the residence of the creditor is to be regarded as the place of payment, in the absence

of any express stipulation. And on redeeming the pledge, the debtor of the pledgee must do equity by paying the debt in the currency of such country, rather than in a depreciated currency which may exist at the time in the country in which the suit is brought. *Stoker v. Cogswell*, 25 How. (N. Y.) 267.

§ 7. **Mode of payment.** If a debtor hands money to a third person, to be handed to the creditor, the right to the money does not vest in the creditor, so as to make it his property, until he is notified of the transaction, and agrees to adopt the act of the third person in receiving the money, as his own act, whereby the debt is extinguished. *Strayhorn v. Webb*, 2 Jones' (No. Car.) L. 199. See, also, *Dickson v. Wright*, 52 Miss. 585; S. C., 24 Am. Rep. 677. And writing a letter to the creditor to inform him that a payment had been made according to his direction, but which the creditor never receives, and therefore loses the benefit of the payment, is not enough. *Holland v. Tyus*, 56 Ga. 56. So, a remittance of money due, by mail, in the absence of any evidence of usage and custom to that effect, and of special authority on the part of the creditor to the debtor so to remit, is at the risk of the party remitting, and is not a discharge of the debt, if not received. *Kington v. Kington*, 11 Mees. & W. 233; *Boyd v. Reed*, 6 Heisk. (Tenn.) 631; *Gurney v. Howe*, 9 Gray, 404. And neither the fact that in a previous instance a remittance was made in that manner, and not objected to, nor a letter of the creditor requesting a remittance, but specifying no mode, will prove such authority. *Morton v. Morris*, 31 Ga. 378; *Burr v. Sickles*, 17 Ark. 428. But see *Townsend v. Henry*, 9 Rich. (So. Car.) 318; *Buell v. Chapin*, 99 Mass. 594. If, however, the debtor is directed by his creditor to remit the amount of the debt by mail, the debtor will be discharged by properly delivering to the postmaster a letter containing the money, if properly addressed to the creditor, at his usual place of residence, or at such other place as the creditor may have appointed. In that case, the creditor makes the mail his agent, and he assumes all risks of loss. See *id.*; 1 Wait's Law & Pr. 1068. But the debtor will not be discharged by delivering the letter to a bellman or other person in the street, nor by a transmission through the mail, of a letter addressed to the creditor in some large city, without any specification of the street or number of the house in which the creditor resides, or transacts business, unless it is shown that the money came safely to hand, or unless the creditor gave that address himself. *Id.* And see *Gordon v. Strange*, 1 Exch. 477. And where the creditor authorizes his debtor to remit to him by mail under certain specified precautionary observances, and a remittance is made without

them, it is no justification that they could not be pursued. *Williams v. Carpenter*, 36 Ala. 9.

Where a special contract to pay money is at variance with a general custom and the previous mode of dealing between the parties, the special contract must prevail. Thus, a special verbal contract to pay a certain sum to the plaintiff's credit, at one particular bank, makes that bank the plaintiff's agent, and the debt is discharged upon payment without notice, notwithstanding a custom existed for the defendant to pay his indebtedness to the plaintiff by depositing money to his credit at *any one of several banks*, the indebtedness not being discharged till he received notice of the deposit. *Exchange Bank v. Cookman*, 1 W. Va. 69.

Where the vendor of goods receives from the vendee, at the time of the delivery, the note or bill of a third person, the presumption is that the note or bill was accepted in payment and satisfaction, unless the contrary be expressly proved by the vendor. *Gibson v. Tobey*, 46 N. Y. (1 Sick.) 637; S. C., 7 Am. Rep. 397. But where the defendant owing the plaintiff a certain sum, paid him, partly in cash and the rest in a debt due him from a third party, the defendant is still liable if he does not do that which is necessary to transfer such interest in the debt to the plaintiff, as will enable the plaintiff to claim it. *Coy v. Dewitt*, 19 Mo. 322.

The only difference between a *cash* and a *credit* payment is, that the former must be made at the time of sale or delivery, and the latter after the credit has expired. Each must be made in the same way, and there is no more reason why the former should be made *in money*, than the latter. *Foley v. Mason*, 6 Md. 37. Where a sale of goods is made for cash, and they are delivered to the vendee upon the condition of payment in cash, an offer by the vendee to pay in the vendor's own over-due notes, is a virtual compliance with the condition, and equivalent to a tender of payment in cash. *Id.*

Where a note is due to a bank, the maker has a right to pay it in the bills issued by the bank. *Blount v. Windley*, 68 No. Car. 1; 12 Am. Rep. 616. See *Leavitt v. Beers*, Hill & Denio, 221.

§ 8. Election as to payment. Where no terms of payment are stated in a contract, the money must be paid within a *reasonable time*; but there is no rule, that money payable in a reasonable time, can, at the election of the party paying, be divided so as to make it payable at different times, and in different years. *O'Donnell v. Leeman*, 43 Me. 158.

Where a contract for work at a certain price provides that payment may be made in specific articles at a certain rate, the debtor has an elec-

tion either to pay the price or deliver the articles, if such election can be fairly implied or is expressed. If the right of election is clearly expressed or fairly implied in the contract, and the debtor fails to deliver the specific articles, the amount of the debt only with interest can be recovered (*Trowbridge v. Holcomb*, 4 Ohio St. 38; *Jones v. Dimmock*, 2 Mich. N. P. 87; *Perry v. Smith*, 22 Vt. 301; *Brooks v. Hubbard*, 3 Conn. 58); but if no such election is expressed or implied, the plaintiff is entitled to the market value of the articles, with interest. *Cleveland, etc., R. R. Co. v. Kelley*, 5 Ohio St. 180. The right to elect between money and specific articles is held to continue up to the day of payment; after that time, the payee's right to demand money is absolute. *Church v. Feterow*, 2 Penr. & W. (Penn.) 301. See *Gilson v. Gilson*, 16 Vt. 464; *Sessions v. Ainsworth*, 1 Root (Conn.), 181.

In a note given for the payment of a sum of money, in specific articles, at "factory prices," the terms "factory prices" are to be construed as the prices at which such goods are sold at factories, unless there be proof of a different technical sense universally established by the custom of trade. *Whipple v. Levett*, 2 Mas. (C. C.) 59.

A note payable "in gold coin or the equivalent thereof in United States legal tender notes" is discharged by payment of legal tender notes, dollar for dollar. *Killough v. Alford*, 32 Tex. 457; S. C., 5 Am. Rep. 249. And the maker of a note due a bank has a right to tender in payment of such note, as equivalent to gold and silver coin, the bills issued by the bank. *Blount v. Windley*, 68 No. Car. 1; S. C., 12 Am. Rep. 616.

Where the vendee of real estate contracts to pay the purchase-money in cash or by the delivery of cotton of a specified class at a designated place, as the payments become due, at his option, the right of election is not lost by the failure to deliver the cotton at the time and place, where it is brought about by the conduct of the vendor. *Brodie v. Watkins*, 31 Ark. 319.

§ 9. Presumption as to payment. Where one pays money to another, in the absence of any explanation as to the cause of the payment the presumption is that it was paid because it was due, and not by way of a loan. *Sayles v. Olmstead*, 66 Barb. 590; *Rohrbacker v. Schilling*, 12 La. Ann. 17; *Bogert v. Morse*, 4 Denio, 108; 1 Comst. 377. Hence, a loan of money by A to B is not to be inferred from the bare fact that A delivered a sum of money to B, which A had borrowed from another. *Id.*; *Welch v. Seaborn*, 1 Stark. 474. And see *Aubert v. Walsh*, 4 Taunt. 293; *Cary v. Gerrish*, 4 Esp. 9.

When one of whom a sum of money is demanded states that he pays it only on certain conditions, the demandant, receiving it and remain-

ing silent, will be presumed to have acquiesced in the conditions. *Hall v. Holden*, 116 Mass. 172.

The law gives to the lapse of time an artificial and technical weight beyond that which it would naturally have, as a mere circumstance, bearing on the question of payment. *Walker v. Wright*, 2 Jones' (No. Car.) L. 155. In cases where the statute of limitations does not apply, the artificial presumption of payment arises from the lapse of twenty years, un rebutted. *Sparhawk v. Buell*, 9 Vt. 41; *Winstanley v. Savage*, 2 McCord's (So. Car.) Ch. 435; *Wells v. Washington*, 6 Munf. (Va.) 532; *Barned v. Barned*, 21 N. J. Eq. 245; *Didlake v. Robb*, 1 Woods, 680. It is a presumption of law, and can be rebutted only by some positive act of unequivocal recognition, like part payment, or a written admission, or at least a clear and well identified verbal promise or admission intelligently made, within the period of twenty years. *Id.*; *Lyon v. Adde*, 63 Barb. 89. There is, however, a presumption of *fact*, or, more properly, in the nature of evidence, which can be drawn by a jury from the circumstances of the case, *in less than twenty years*. *Cheever v. Perley*, 11 Allen, 587; *Goldhawk v. Duane*, 2 Wash. (C. C.) 323; *Bander v. Snyder*, 5 Barb. 63; *Henderson v. Lewis*, 9 Serg. & R. 384; *Milledge v. Gardner*, 33 Ga. 397; *Lyon v. Guild*, 5 Heisk. (Tenn.) 175; *Fleming v. Emory*, 5 Harr. (Del.) 46; *Wooten v. Harrison*, 9 La. Ann. 234; *Garnier v. Renner*, 51 Ind. 372. And slight circumstances may be given in evidence for that purpose in proportion as the presumption strengthens by the lapse of time; but still, they must be such as aid the presumption arising from time. They must be, as it is said, *persuasive* that the time would not have been suffered to elapse had the debt remained unpaid. *Moore v. Smith*, 81 Penn. St. 182; *Hughes v. Hughes*, 54 *id.* 240. The testimony must not be so equivocal as to possess no tendency in any direction. *Id.* When the obligation can be extinguished only by deed, there is no presumption of law at all; but there is the same presumption, in the nature of evidence, as in other cases. *Lyon v. Adde*, 63 Barb. 89.

The presumption of payment arising from the lapse of twenty years un rebutted, no more permits a jury to give to a shorter time a force beyond its natural efficacy in producing belief, than the bar under the statute of limitations permits a nearer approach to the statutory period to avail. *Smithpeter v. Ison*, 4 Rich. (So. Car.) 203. And the presumption prevails in equity, as well as at law. *Bird v. Inslee*, 23 N. J. Eq. 363. See, also, *Field v. Wilson*, 6 B. Monr. (Ky.) 479; *Martin v. Bowker*, 19 Vt. 526; *ante*, p. 223, tit. *Limitations*.

The lapse of twenty years has been held to create a presumption of payment in the case of a bond (*Durham v. Greenly*, 2 Harr. [Del.]

124; *Haskell v. Keen*, 2 Nott & M. [So. Car.] 160; *Bartlett v. Bartlett*, 9 N. H. 398; of a legacy (*Hayes v. Whitall*, 13 N. J. Eq. 241; *Okeson's Appeal*, 59 Penn. St. 99; 2 Grant's [Penn.] Cas. 303); of a tax (*Dalton v. Bethlehem*, 20 N. H. 505); of a judgment (*Kennedy v. Denoon*, 3 Brev. [So. Car.] 476; *Bird v. Inslee*, 23 N. J. Eq. 363; *Burton v. Cannon*, 5 Harr. [Del.] 13); of a recognizance in the orphan's court (*Ankeny v. Penrose*, 18 Penn. St. 190); of money due under a contract for the purchase of land (*Morrison v. Funk*, 23 id. 421; *McCormick v. Evans*, 33 Ill. 327); of a debt secured by a mortgage of land (*Sweetser v. Lowell*, 33 Me. 446; *Ingraham v. Baldwin*, 9 N. Y. [5 Seld.] 45); and, as a general rule, in all cases of contracts for the payment of money, whether sealed or unsealed. *Clark v. Clement*, 33 N. H. 563. See, also, *Daggett v. Tallman*, 8 Conn. 168. But see *DuBelloix v. Lord Waterpark*, 1 Dowl. & Ry. 16. Where a bill was filed to settle accounts more than twenty years after the transaction took place from which they arose, and where the justice of the claim had not been admitted during that time, the staleness of the demand was held to be a sufficient reason for refusing relief. *Kingsland v. Roberts*, 2 Paige, 193. On a bill against executors, to recover money alleged to have been received by their testator for the use of the ancestor of the complainants, it was held that more than thirty years having elapsed since the receipt of the money, payment would be presumed. *O'Brien v. Holland*, 3 Blackf. (Ind.) 490.

Although the lapse of seventeen years after a bond became due is not, *per se*, sufficient to authorize the legal presumption of payment by obligors of undoubted solvency, during that entire period, yet it is a *persuasive* circumstance, in the absence of any demand or recognition, or partial payment of principal or interest, and may, when slightly corroborated, be sufficient evidence of payment. *Moore v. Pogue*, 1 Duval (Ky.), 327. See, also, *Moore v. Smith*, 81 Penn. St. 182. And slight circumstances may be left to the jury, on the issue of the payment of a bond, when *sixteen* years have elapsed. *Blackburn v. Squibb*, Peck (Tenn.), 60. The transcript of the judgment of a justice of the peace was filed in the common pleas, in Pennsylvania, more than nineteen years after the judgment was rendered. The justice was not called nor the docket produced, and there was nothing to show whether an execution had ever been issued by the justice. And it was held that the jury were at liberty to infer payment from the lapse of time and these circumstances. *Diamond v. Tobias*, 12 Penn. St. 312. See, also, *Winstanley v. Savage*, 2 McCord's (So. Car.) Ch. 435.

The payment of rent reserved in a perpetual lease or conveyance, in fee, may be presumed after the lapse of twenty years. But the non-

payment for more than that period does not raise a presumption that the covenant to pay rent has been released and discharged. *Lyon v. Odell*, 65 N. Y. (20 Sick.) 28.

After the lapse of twenty years, the acknowledgment, in the assignment of a mortgage, of the payment of the consideration, is sufficient evidence of the payment of the purchase-money. *Pryor v. Wood*, 31 Penn. St. 142.

And where a bond and mortgage, given by a father, were found by his children at his death, amongst his papers, the same having been in the father's possession for many years, and no claim having been made for either principal or interest for a period of ten years, the presumption is that the mortgagor and his children were lawfully in possession of the bond and mortgage, and that the same are paid. *Levy v. Merrill*, 52 How. (N. Y.) 360.

In a debt, payable by installments and secured by a penal bond, the presumption of payment arising from lapse of time, applies to each installment as it falls due. *State v. Lobb*, 3 Harr. (Del.) 421.

A presumption of payment, arising from length of time, in favor of one of several obligors, is a payment as to all. *Pearsall v. Houston*, 3 Jones' (No. Car.) L. 346; *Lowe v. Sowell*, id. 67.

§ 10. **When payment not presumed.** Where the presumption of payment depends on time alone, nothing short of twenty years will raise it. *Forsyth v. Ripley*, 2 Greene (Iowa), 181; *Stockton v. Johnson*, 6 B. Monr. (Ky.) 408; *Rogers v. Burns*, 27 Penn. St. 525. Thus, where a bond for the payment of money has been due more than eighteen years, the mere lapse of time would not be sufficient to establish a presumption of payment. *Farrington v. King*, 1 Bradf. (N. Y.) 182. But, as seen in the preceding section, payment may be presumed from other circumstances in connection with lapse of time. Id.; *Clark v. Bogardus*, 2 Edw. Ch. (N. Y.) 387; *Wightman v. Butler*, 2 Spears (So. Car.), 357.

Payments by an executor or administrator, toward a judgment recovered against the decedent, and existing as a lien at the time of his death, will prevent the presumption of payment, arising from lapse of time. *Richardson v. Peterson*, 2 Harr. (Del.) 366. An admission, within twenty years, that the debt is due (*Arline v. Miller*, 22 Ga. 330), or a payment of interest (*Nixon v. Bynum*, 1 Bailey [So. Car.], 148), removes the presumption of payment. *McDowell v. McCullough*, 17 Serg. & R. 51; *Goldhawk v. Duane*, 2 Wash. (C. C.) 323. So, inability to pay, as poverty, has been held sufficient. *Madony v. Winter*, 19 Ves. 196; *Daggett v. Tullman*, 8 Conn. 168, 176. So, of insolvency or a state approaching it. *Woodbury v. Taylor*, 3 Jones'

(No. Car.) L. 504; *Boardman v. DeForest*, 5 Conn. 1. So, that the parties were near relations. *Hillary v. Waller*, 12 Ves. 239, 266. Another answer is, the long continued, permanent absence of the debtor (*Newman v. Newman*, 1 Stark. 101; *Shields v. Pringle*, 2 Bibb [Ky.], 387), or absence abroad, as where the creditor resided in England and the debtor in the United States. *Goldhawk v. Duane*, 2 Wash. (C. C.) 323. See, also, *McNair v. Ragland*, 1 Dev. (No. Car.) Eq. 533. And if any disability exist when the right accrues, such as infancy, coverture and the like, these must be removed before the twenty years begin to run. *Jackson v. Johnson*, 5 Cow. 74. See *ante*, p. 223, tit. *Limitations*. So, where a subsequent disability of the plaintiff to sue has arisen, the period of such disability must be deducted from the twenty years; as where he becomes an alien enemy after the cause of action has accrued, the whole time of the continuance of the war must be excluded from the calculation. *Bailey v. Jackson*, 16 Johns. 210.

Presumption of payment has been held not to arise from lapse of time, that taxes were paid, where a referee has expressly found the fact that they were not paid, either in money or labor. *Haverhill v. Orange*, 47 N. H. 273. Nor, from the non-payment of rent from twenty to twenty-four years, where circumstances excuse the delay in demanding the rent. *Cole v. Patterson*, 25 Wend. 457. Nor will a release or conveyance, extinguishing the rent, be presumed. *Id.*; *Lyon v. Odell*, 65 N. Y. (20 Sick.) 28. And no presumption of payment, from the lapse of time, can be raised against the government. *United States v. Williams*, 4 McLean (C. C.), 567. See *ante*, p. 223, tit. *Limitations*.

§ 11. **When inferred from circumstances.** Though, as matter of law, the payment of a debt due by specialty will not be presumed until the lapse of twenty years, yet a shorter time, connected with other evidence, may be left to a jury, from which they may find payment. *Gould v. White*, 26 N. H. 178; *Baker v. Stonebraker*, 36 Mo. 338; *ante*, p. 390, § 9. The other evidence relied upon must, however, be of such a character as to produce a belief in the mind of the jury that payment has, in fact, been made. *Bradley v. Jennings*, 15 Rich. (So. Car.) 34. Payment may be presumed from the circumstances that the creditor, having no money, called on the debtor, and was seen to come away with money, which he said he got from the debtor. *Whistler v. Drake*, 35 Iowa, 103. The possession of a bill, by the drawee, after maturity, is *prima facie* evidence of payment. *Hill v. Gayle*, 1 Ala. 275. And see *Smith v. Harper*, 5 Cal. 329. And where the payee of a promissory note, in her last sickness, handed the

note to her sister, to be given to the maker in payment for boarding and taking care of her, it was held that this was a valid cancellation of the note. *Edwards v. Campbell*, 23 Barb. 423. See *Grey v. Grey*, 47 N. Y. (2 Sick.) 552. But the maker of a promissory note, which has been surrendered by mistake, under the supposition that it was fully paid, will remain liable for the balance still unpaid. *Banks v. Marshall*, 23 Cal. 223.

The payment of a subsequent debt always raises some presumption that prior debts have been paid. Thus, where a mortgage was secured by three notes, and the last two due were shown to have been sued and recovered, it was held that after thirty years, in the absence of opposing proof, this presumption was irresistible. *Mathews v. Light*, 40 Me. 394. So, the law presumes, previous rent paid when the landlord gives receipts for subsequently accruing quarterly rent in full. *Patterson v. O'Hara*, 2 E. D. Smith (N. Y.), 58. So, the payment of a highway tax for one year will be presumed, from its not being included in the tax bill of the succeeding year, though the presumption may be repelled by evidence. *Attleborough v. Middleborough*, 10 Pick. 378. And the return of an execution satisfied raises a presumption that the money collected was received by the plaintiffs. *Boyd v. Foot*, 5 Bosw. (N. Y.) 110. See, also *Benson v. Benson*, 24 Miss. 625.

Where a father, being indebted to his children, conveys to them property of greater value than the amount of indebtedness, it will be presumed to have been in satisfaction of the debt, unless the contrary is proved. *Kelly v. Kelly*, 6 Rand. (Va.) 176. Where A is indebted to B, and draws a check in his favor, and B receives the money thereon, it is presumed that it was in payment of the existing debt due from A to B. *Masser v. Bowen*, 29 Penn. St. 123. And see *Hansen v. Kirtley*, 11 Iowa, 565. But where property is placed by the debtor in his creditor's hands, it is not to be considered as payment in full, unless that appears to be the intention of the parties. *Perit v. Pittfield*, 5 Rawle (Penn.), 166. And a payment of money by payees to one of the makers of a note, for services rendered after its maturity, was held not to constitute a presumption that he had paid the note. *Mechanics' Bank v. Wright*, 53 Mo. 153.

A bond of a stranger, placed by a debtor in the hands of his creditor for collection, will be presumed as paid, unless it is returned, or offered to be returned, in a reasonable time. *Day v. Clarke*, 1 A. K. Marsh. (Ky.) 521. And where accounts are rendered by a broker to his principal and no mention is made therein of a claim for which the principal, as joint debtor, was liable, a presumption is raised that it

had been paid which must be rebutted before the broker can recover. *Smith v. Tucker*, 2 E. D. Smith (N. Y.), 193.

But the appointment of a debtor as executor, and his acceptance of the trust, do not constitute a discharge or payment of the debt. *Winship v. Bass*, 12 Mass. 199, 205.

§ 12. **Burden of proof.** Where the defense relied upon is payment of the demand in suit, the burden of proof is upon the defendant to establish the fact of payment by a preponderance of evidence. *Adams v. Field*, 25 Mich. 16; *Shulman v. Brantley*, 50 Ala. 81. And the payment must be proved to have been *received*, as well as made, in satisfaction of the debt. *Cushing v. Wyman*, 44 Me. 121. See, also, *Sweet v. Titus*, 67 Barb. 327. But if both parties admit that an apparent payment was made, but the plaintiff claims to recover on the ground that the bills in which it was made were spurious, the burden of proof is upon him, to prove the character of the bills. *Atwood v. Cornwall*, 25 Mich. 142.

In an action on a promissory note, by the indorsee against the maker, where the defense is payment to the indorser the payee, after proof of the transfer the burden is upon the maker to show that the payment was made before the transfer. *Smith v. Prescott*, 17 Me. 277. And where, to a suit on the antecedent debt, the defendant sets up that negotiable paper has been given to secure it, the burden is upon him to show either that such paper has been paid, or that the debtor has been injured through the *laches* of the creditor. *Kenniston v. Avery*, 16 N. H. 117. Where an attorney indorses on a note in suit, which is shown never to have been in possession of the plaintiff, a part payment, such indorsement is not binding upon the plaintiff, unless the attorney's authority to make it is shown. *Gould v. Tutum*, 21 Ark. 329. And where a party relies on the possession of a note to show that he paid it at the maker's request, he must first show that it was once in the hands of the payee. *Mygatt v. Pruden*, 29 Ga. 43.

When it is uncertain whether the payment of a mortgage debt was made before, on, or after the day when due, the legal presumption is, that it was on that day. *Johnson v. Carpenter*, 7 Minn. 176.

§ 13. **Proof admissible as to payment.** The surrender of a note is *prima facie* evidence of its payment. *Smith v. Harper*, 5 Cal. 329. So, the possession of protested drafts by the drawer is *prima facie* evidence of their payment by him. *Skannel v. Taylor*, 12 La. Ann. 773. So, an order to pay money is, in the hands of a drawee, evidence of payment. *Succession of Penny*, 14 id. 194; *Hillyard v. Crabtree*, 11 Tex. 264. And the cancellation of a check upon, and its retention by a bank, is evidence of its payment. *Conway v. Case*, 22 Ill. 127.

So, where P. and D. gave their joint notes, and after the death of P. they were found among his papers, it was held to be *prima facie* evidence that they were paid by him. *Chandler v. Davis*, 47 N. H. 462. But when a note has been paid and delivered up, it will not be presumed that the maker afterward retains it in his possession; and, therefore, parol evidence is admissible to prove a payment, when it becomes a material inquiry, without calling upon the party to whom the writing was delivered to produce it. *Mead v. Brooks*, 8 Ala. 840. A payment evidenced by a receipt may be proved by a witness or by the production of the receipt itself; but when it is proved by a witness, he must know the fact independently of the receipt. *Keith v. Mafit*, 38 Ill. 303. Proof that money, agreed to be paid, was sent by mail, strengthened by circumstances, is *prima facie* proof of receipt and payment. *Waydell v. Velie*, 1 Bradf. (N. Y.) 277. See *ante*, p. 390, § 9. So, the declarations of a creditor, or of his general agent, that his debt is discharged, is *prima facie* evidence of payment. *State Bank v. Wilson*, 1 Dev. (No. Car.) L. 484. And a letter from a judgment creditor to the debtor, acknowledging satisfaction of the judgment, was held to be admissible, under the circumstances of the case, as evidence of such payment. *Hunter v. Campbell*, 1 Spears (So. Car.) 53. On the question of the payment of a judgment, the execution, with actual proof of the money paid on it, is good evidence. *Ramsey v. Johnson*, 3 Penr. & W. (Penn.) 293. And the entry of satisfaction of a judgment on the record is evidence to a jury from which they may infer that the judgment has been paid; but, *per se*, it only imports a release of the judgment, and it may be shown by extrinsic evidence that the judgment was not in fact paid. *Reynolds v. Magness*, 2 Ired. (No. Car.) L. 26.

If, upon a trial, it is important to show a payment to some third person, proof, which would be good against that third person, is admissible to establish such payment. *Reed v. Rice*, 25 Vt. 171.

And the character of the creditor for promptness in the collection of his debts may be given in evidence as a circumstance to show that a debt has been paid, after eight years have elapsed. *Leiper v. Erwin*, 5 Yerg. (Tenn.) 97.

On an issue whether the parties agreed to accept a particular sum as the price of property, or as the payment of a balance of account, if the evidence of the agreement is conflicting, evidence of the value of the property or the amount due on the account may be received as tending to show what agreement is probable. *Brown v. Cahalin*, 3 Oreg. 45.

§ 14. **What not admissible.** An indorsement on a bond or note, made by the obligee or promisee without the privity of the debtor,

cannot be admitted, as evidence of payment, in favor of the party making such indorsement, unless it be shown that it was made at a time when it operation would be against the interest of the party making it. *Roseboom v. Billington*, 17 Johns. 182; *Alston v. State Bank*, 9 Ark. 455; *McGehee v. Greer*, 7 Port. (Ala.) 537; *Concklin v. Pearson*, 1 Rich. (So. Car.) 392; *Sinclair v. Baggaley*, 4 Mees. & W. 318; *Anderson v. Weston*, 6 Bing. N. C. 296; *Miller v. Dawson*, 26 Iowa, 186. Nor, are indorsements on a note any evidence of payments, unless they are shown to have been made by some one having authority to receive payments. *Ray v. Bell*, 24 Ill. 444. And it is held that an indorsement upon a bond, after suit brought, of the receipt of a note in payment of a particular installment, is not evidence of the payment of the prior installments. *Sennett v. Johnson*, 9 Penn. St. 335.

It is no evidence of payment of labor, that other laborers employed by the party, on the same work, at the same time, were paid by him. *Filer v. Peebles*, 8 N. H. 226. Nor are the wealth of the maker of a promissory note, and his dealings with third persons, competent evidence to prove payment of the note. *Hilton v. Scarborough*, 5 Gray, 422. The solvency of a debtor is inadmissible in evidence of payment of his debt. *Veazie v. Hosmer*, 11 id. 396. See, also, *Abercrombie v. Sheldon*, 8 Allen, 532.

Depositing a letter containing money with one who is merely an agent to carry the mail bags, is no evidence that it was mailed. *Davis v. Allen*, 25 Ga. 234. So, a direction by letter, from a third person to the payees of a note, to pay the same out of the proceeds of certain property in the hands of the payees belonging to such third person, is inadmissible as evidence of the payment of the note, unless it appears that the request has been complied with. *King v. Bush*, 36 Ill. 142. And an order in an agent's possession, to pay what he has collected to the drawers' trustee, the amount being unknown to the drawer, is a mere authority, and no evidence of any payment by him. *Beardslee v. Horton*, 3 Mich. 560.

An acknowledgment by the plaintiff that he received money from the defendant, but at the same time stating that it was a loan, is not an admission of payment. *Oldham v. Henderson*, 4 Mo. 295. So, the policy of insurance is not evidence, without other proof of the payment of the premium. *Millick v. Peterson*, 2 Wash. (C. C.) 31. And it is held that the delivery of an execution to a plaintiff, and no return thereto, or failure to procure satisfaction shown, is not *prima facie* evidence of the payment of the judgment. *Runyan v. Weir*, 8 N. J. Law, 286.

An unexecuted agreement by a mortgagee of realty, with two out

of the three mortgagors, to take the mortgaged premises in payment of the mortgage notes is not evidence of the payment of such notes, in a suit by the mortgagee against the indorser of them. *Green v. Davis*, 44 N. H. 71.

§ 15. **What sufficient proof.** The extinguishment of a debt by payment must be shown by reasonable certainty. *Succession of Moreira*, 16 La. Ann. 368. But where the defense of payment is interposed in an action upon a note or other security, and the testimony is conflicting and evenly balanced, the possession by the plaintiff of the uncancelled security is a material circumstance, and should turn the scale in his favor, unless satisfactorily explained by the defendant. *Doty v. James*, 28 Wis. 319. The acknowledgment in a deed of the payment of a consideration is, uncontradicted, sufficient evidence of the fact of such payment. *Wood v. Chapin*, 13 N. Y. (3 Kern.) 509; *Bassett v. Bassett*, 55 Me. 127. And parol evidence is sufficient to prove the payment of a mortgage. *Mauzey v. Bowen*, 8 Ind. 193. See, also, *Morgan v. Davis*, 2 Harr. & M. (Md.) 9; *Seighman v. Marshall*, 17 Md. 550; *Harrison v. Eldridge*, 2 Halst. (N. J.) 407. A mortgage being considered and treated merely as a security for the payment of money, or the performance of some other act, is simply a chose in action extinguishable by a parol release, which equity will execute as an agreement not to sue, or by turning the mortgagee into a trustee for the mortgagor; provided it proceeds upon a sufficient consideration. Such a release or agreement may be established presumptively, by showing declarations and acts of the parties inconsistent with an averment of the continued existence of the mortgage, and repugnant to the rights and liabilities created by it, as well as by express proof. *Ackla v. Ackla*, 6 Penn. St. 228.

As a general rule, the premium note of an insurance broker, received by the insurers in payment of a policy for his principal, discharges the principal from his liability to the insurers on account of the premium. But if the policy contain a provision that, in case of loss, the amount of the premium note shall be deducted from the insurance, the insured must submit to the deduction, although he has before paid the amount of the premium to the broker. *Union Ins. Co. v. Grant*, 68 Me. 229; *Hurlbert v. Pacific Ins. Co.*, 2 Sumn. (C. C.) 471, 478.

An indorsement upon a promissory note, purporting that a sum of money was paid upon it at a particular date, is not of itself sufficient to show such payment at that time, and thus to take the case out of the statute of limitations. *Marshall v. Daniels*, 18 N. H. 364; *Walker v. Wykoff*, 14 Ala. 560. See *ante*, p. 390, § 9. But receipts upon a note, if apparently fair, and not attended with circumstances calculated

to excite suspicion that they were indorsed for the purpose of taking the case out of the statute of limitations, are *prima facie* evidence of the fact they indicate. In other words, if there be nothing to induce a belief that the receipt is not a fair one, the jury ought, and no doubt will, always presume that the payment was made. *Gibson v. Peebles*, 2 McC. (So. Car.) 418. And see *Morris v. Morris*, 5 Mich. 171; *Davenport v. Schram*, 9 Wis. 119. See *ante*, p. 390, § 9.

If the payee of a note deliver the same to the maker, this is not conclusive of payment, and testimony is admissible to show its non-payment. *Fellows v. Kress*, 5 Blackf. (Ind.) 536. So, the words, "on settlement up to date," added to a promise to pay for value received, are only *prima facie* evidence that the settlement embraced all subsisting matters of account, and may be explained or contradicted by extrinsic evidence.

Wheeler v. Alexander, 1 Strobb. (So. Car.) 61. In an action of debt on a bond against two obligors, the defendants, in order to sustain the plea of payment, adduced evidence that one of them put money into the hands of a third person to pay the debt, who informed the plaintiff that he had the money to pay off the bond, but that the plaintiff declined to receive it, saying that he owed the other obligor more money, without saying that the debt between them had been settled, and it was held that the evidence afforded no proof of payment. *Green v. Buckner*, 6 Leigh (Va.), 83.

And in an action at law upon a note, where the defendant sets up payment by the delivery of a deed of land from the maker to the payee, and, in proving his case, shows that the conveyance was in fact a mortgage to secure the note, the plaintiff is entitled to judgment. *Lodge v. Turman*, 24 Cal. 385. And see *Sears v. Dixon*, 33 id. 326.

§ 16. **Rebutting proof.** Presumption of payment from lapse of time is repelled by the fact that the debtor had removed to and resided in a different State from that of the creditor during such lapse of time. *Boardman v. DeForrest*, 5 Conn. 1; *Mann v. Manning*, 20 Miss. 615. And see *ante*, p. 390, § 9. But see *Kline v. Kline*, 20 Penn. St. 503. So, a payment or acknowledgment of a part of a specialty debt, within twenty years, rebuts the presumption of payment as to the whole. *Martin v. Bowker*, 19 Vt. 526; *Eby v. Eby*, 5 Penn. St. 435; *Bissell v. Jaudon*, 16 Ohio St. 498. See, also, *Hamlin v. Hamlin*, 3 Jones' (No. Car.) Eq. 191; *McKeethan v. Atkinson*, 1 Jones' (No. Car.) L. 421. The want of a person against whom to bring suit, rebuts the presumption of payment arising from forbearance to sue. *Buie v. Buie*, 2 Ired. (No. Car.) L. 87. And it is held that, where a note with the signature of the promisor torn off, remains in the possession of the promisee, that fact repels the presumption of pay-

ment. *Powell v. Swan*, 5 Dana (Ky.), 1. It has likewise been held, that an indorsement of credit on a bond, made by the obligee within the period that raises the legal presumption of payment, is evidence for him repelling that presumption. *Dabney v. Dabney*, 2 Rob. (Va.) 622. See *ante*, p. 397, § 14. And the presumption of payment arising from the lapse of time is liable to be rebutted and overcome by proof of *any* facts and circumstances, the legitimate tendency of which is to render it more probable than otherwise, that payment has not in fact been made. *Grantham v. Canaan*, 38 N. H. 268; *Wood v. Deen*, 1 Ired. (No. Car.) L. 230; *McKinder v. Littlejohn*, *id.* 66; *Arden v. Arden*, 1 Johns. Ch. 313; *Abbott v. Godfroy*, 1 Mich. 178; *Sutphen v. Cushman*, 35 Ill. 186; *Knight v. Macomber*, 55 Me. 132.

But circumstances merely rendering the collection of a debt *improbable*, as the poverty of the debtor, are not admissible to rebut the presumption of payment. *Rogers v. Judd*, 5 Vt. 236. Evidence of the commencement of a former suit, afterward abandoned, will not rebut the presumption of payment of a bond, on which no interest had been paid for twenty-three years. *Palmer v. Dubois*, 1 Mill's (So. Car.) Const. 178. And where one of two co-obligors, in a bond, says: "I signed the note but will never pay it," this will not rebut the presumption of payment, from length of time, for it does not tend to prove that his co-obligor has not paid it. *Wilfong v. Oline*, 1 Jones' (No. Car.) L. 499. And part payment by an heir at law, on a bond, will not contradict the presumption of payment from lapse of time, in a suit against the executor. *Blake v. Quash*, 3 McCord (So. Car.), 340.

In a suit by the payee, on a promissory note, the plaintiff offered the note in evidence. Upon it were sundry indorsements of payments, not, however, shown to be in the handwriting of the payee, and it was held that the defendant might properly offer, in evidence, these indorsements; for, since the note had not left the plaintiff's possession, the burden was upon him to overturn the inference that he was the person who had made the indorsements, and received the payments. *Brown v. Gooden*, 16 Ind. 444.

§ 17. **Effect of payment.** An acceptance by the creditor of the principal of the debt, whether the debt is past due or running to maturity, is held to be a good defense as an accord and satisfaction. *Westcott v. Waller*, 47 Ala. 492. See Vol. 6, p. 511. And a payment in whole or in part of the principal debt is a payment *pro tanto* of the collateral security. *Rutledge v. Townsend*, 38 Ala. 706. It is, however, held that where a promissory note is indorsed before maturity, as collateral security for a debt less than the amount of the note, the holder is entitled to recover the full amount in an action against the

maker. And payment to the payee cannot be set up to reduce the amount of the judgment to the amount of the debt secured. *Gowen v. Wentworth*, 17 Me. 66. And where the payee of a negotiable note receives a payment upon it, and, afterward, transfers it, before maturity, to an indorsee without notice, such payment will not furnish any defense against a suit by such indorsee. *Grant v. Kidwell*, 30 Mo. 455.

The receipt of property as payment is the same as payment in money. *Tinsley v. Ryon*, 9 Tex. 405. If a creditor agrees to take promissory notes of a third party in payment of his debt, if such notes prove *collectible*, he is bound to sue upon the notes if necessary to their collection. Such a transaction is equivalent to an agreement to collect the notes, so far as the same can be done by the use of ordinary means and diligence. *In Re Ouimette*, 1 Sawyer (C. C.), 47. See Vol. 1, pp. 582, 585.

If a debtor pays money to a creditor under the belief that it is in compromise of a debt, and the creditor retains the money, after notice of the erroneous belief under which the payment was made, and an offer of rescission by the party paying, he does not thereby affirm the correctness of the party's belief, and is not precluded from the collection of his debt. *Steiner v. Ballard*, 42 Ala. 153.

If, on the trial of an action on a promissory note, the plaintiff, against the protestation of the defendant, credits upon the note a sum, which he claims to be the amount of the defendant's account, and obtains judgment for the balance of the note, which the defendant afterward pays, it does not operate as a discharge of the defendant's account or any part thereof. *Keith v. Smith*, 1 Swan (Tenn.), 92.

In an action against several persons for a joint trespass and an injury to the plaintiff, the plaintiff received money in satisfaction of the wrong done him by the party paying him, and it was held that this was satisfaction as to all the defendants, and that they were thereby discharged of all liability to the plaintiff, whether the parties intended such discharge or not. *Brown v. Kencheloe*, 3 Coldw. (Tenn.) 192. And see *Lowe v. Sowell*, 3 Jones' (No. Car.) L. 67; Vol. 6, p. 418.

If a mortgagee, who has foreclosed his mortgage, accepts payment of the mortgage debt, it is a waiver of the foreclosure by him. *Gould v. White*, 26 N. H. 178.

Actual payment discharges a bond or judgment at law, but not in equity, if justice require the parties in interest to be restrained from alleging it, or insisting on their legal rights. *McCormick v. Irwin*, 35 Penn. St. 111.

§ 18. Voluntary payment. If a party, with full knowledge of all

the facts, voluntarily pays money in satisfaction of a demand made upon him, he cannot afterward allege such payment to have been unjustly demanded, and recover back the money. *Woodburn v. Stout*, 28 Ind. 77; *Jacobs v. Morange*, 47 N. Y. (2 Sick.) 57; *Gilson v. Bingham*, 43 Vt. 410; S. C., 5 Am. Rep. 289; *Bank of United States v. Daniel*, 12 Pet. (U. S.) 32. Thus, a voluntary payment made in gold coin, prior to the decision of the supreme court of the United States, holding that payment in legal tender was constitutional (See *Knox v. Lee*, 12 Wall. 457), cannot be recovered back after such decision, if the payment was made without any misapprehension or mistake of fact. *Doll v. Earle*, 65 Barb. 298; S. C. affirmed, 59 N. Y. (14 Sick.) 638. So, a municipal corporation, in pursuance of a statute, passed an ordinance requiring a license for the sale of intoxicating liquors, and imposing a penalty for selling without a license. The plaintiff, a liquor dealer, procured a license and paid a fee therefor; afterward the statute and the ordinance were decided to be unconstitutional and void. And it was held, that the plaintiff could not recover back the money paid for the license. *Town of Ligonier v. Ackerman*, 46 Ind. 552; S. C., 15 Am. Rep. 323.

And where a plaintiff in replevin pays to the collector, without the request and against the will of the defendant, a tax assessed to the defendant on property wrongfully replevied, where there has been no seizure of property to enforce its collection, such payment is to be regarded as voluntary. And in such case the plaintiff cannot recover the amount so paid against the owner, nor can he claim it in reduction of damages for such wrongful taking. *Washington Ice Co. v. Webster*, 68 Me. 449. But an action may be brought for bank bills left in a sheriff's hands by agreement, instead of gold, silver, copper and paper currency levied on by the sheriff. The agreement to exchange is not a waiver nor a voluntary payment. *St. Louis, etc., R. R. Co. v. Castello*, 28 Mo. 379. And where a person has paid money under the pressure of legal process, such payment is not voluntary. *Cocke v. Porter*, 2 Humph. (Tenn.) 15. But in order to entitle a person to recover back money so paid it must have been exacted under a threat of prosecution, and paid under protest. *Harvey v. Town of Olney*, 42 Ill. 336; *Baker v. City of Cincinnati*, 11 Ohio St. 534; *Garrison v. Tillinghast*, 18 Cal. 408; *Cook v. City of Boston*, 9 Allen, 393; *Taylor v. Board of Health*, 31 Penn. St. 73; *Town of Ligonier v. Ackerman*, 46 Ind. 552; S. C., 15 Am. Rep. 323. No one can be heard to say that he had the right and the law with him, but he feared his adversary would carry him into court and that he would be unlawfully fined and imprisoned, and that, being thereby deprived of his

free will, he yielded to the wrong, and the courts must assist him to a reclamation. *WALKER, C. J., in Town Council of Cahaba v. Burnett*, 34 Ala. 400, 404. A payment is not, therefore, to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress. See *id.*, and cases above cited. A payment made under a distress warrant was held not to be compulsory. *Mayor, etc., of Baltimore v. Lefferman*, 4 Gill (Md.), 425. So, it was held in *Jenks v. Lima Township*, 17 Ind. 326, that an illegal tax, voluntarily paid, cannot be recovered back. See, also, *Shoemaker v. Board of Commissioners*, 36 *id.* 176. And that the payment is regarded as *voluntary*, unless it be made to procure the release of person or property from the power of the officer. *Id.* It has, however, been held, that if a person pays an illegal tax, in order to prevent the issuing of a warrant of distress, with which he is threatened, and which must issue, of course, unless the tax is paid, the payment is to be deemed compulsory and not voluntary. *Preston v. City of Boston*, 12 Pick. 7; *Joyner v. Inhabitants, etc., in Egremont*, 3 Cush. 567. See, also, *Ford v. Holden*, 39 N. H. 143; *Maxwell v. Griswold*, 10 How. (U. S.) 242; *Cuddeval v. Collins*, 4 Ad. & El. 858; *Morgan v. Palmer*, 2 Barn. & C. 729; *Steele v. Williams*, 8 Exch. 624; *Valpy v. Manley*, 1 Man. Gr. & S. 592. The rule stated in the case last cited is, that where a party is in, claiming under legal process, the owner of the goods contending that the possession is illegal, and paying money to avert the evil and inconvenience of a sale, may recover it back in an action for money had and received, if the claim turns out to have been unfounded. And see *County of La Salle v. Simmons*, 10 Ill. (5 Gilm.) 513.

Compulsory payment of a debt to a receiver, under the sequestration acts of the self-styled Confederate government, constitutes no defense to an action brought by the creditor, in a court of the United States, to recover the demand. *Shortridge v. Macon*, Chace's Dec. 136; Phill. (No. Car.) L. 392; 1 Abb. (U. S.) 58; *Luter v. Hunter*, 30 Tex. 688; *Levison v. Krohne*, 30 *id.* 714.

§ 19. **Partial payments.** Where the amount due is undisputed, the payment of a less sum than the amount really due is not good, either by way of accord and satisfaction or payment. *Markel v. Spitler*, 28 Ind. 488; *Brooks v. Moore*, 67 Barb. 393; *ante*, p. 382, Vol. 6, p. 419. Even the *acceptance* of a part of what is due as a payment in full is not binding on the creditor (*Wheeler v. Wheeler*, 11 Vt. 60; *Curtiss v. Martin*, 20 Ill. 557), without a release under seal. *Williams v. Carrington*, 1 Hilt. (N. Y.) 515. But see *Keen v. Vaughan*, 48 Penn. St. 477; *Emrie v. Gilbert*, Wright (Ohio), 764.

And a payment accepted by the express terms of a written receipt "in full of all demands," was held to operate as a repudiation of further liability, and not to take the residue of a demand out of the statute of limitations. *Berrian v. New York*, 4 Robt. (N. Y.) 538. So, a debtor on account offered his creditor a certain sum, if he would accept it and sign a receipt in full, and if not the money to be returned. The creditor counted the money and refused to return it or sign the receipt, and declared that he did not accept the money in full payment, and it was held that it was full payment and discharged the account. *Cole v. Champlain Co.*, 26 Vt. 87. So, a note payable in a series of installments, provided that a less sum would be accepted in full payment if each installment were paid punctually, and it was held that the larger sum was in the nature of a penalty, and that the payment of the less discharged the obligation though defaults had occurred in paying the installments. *Longworth v. Askren*, 15 Ohio St. 370. And the principle that a liability cannot be discharged by a less sum than what is due has never been extended to a case where merchandise or property in gross is accepted in satisfaction. *Gavin v. Annan*, 2 Cal. 494; *Gaffney v. Chapman*, 4 Robt. (N. Y.) 275; Vol. 6, p. 421 *et seq.*

A part payment of a demand, made by one of two joint and several debtors, does not release him. His obligation is to pay the whole. *Griffith v. Grogan*, 12 Cal. 317. See *Adams v. Bank of Louisiana*, 3 La. Ann. 351. If the maker of a promissory note makes a payment to the payee, which is not indorsed, it is valid against the indorsee who receives it after it is due. *Capps v. Gorham*, 14 Ill. 198. But where a note was assigned before maturity and a payment had been made upon it, the maker cannot avail himself of it unless the assignee had notice of it before he took it. *Mobley v. Ryan*, 14 id. 51.

As to the effect of partial payment in suspending the statute of limitations, see Vol. 6, p. 301.

ARTICLE II.

PAYMENTS OTHER THAN IN MONEY.

Section 1. In general. Payment must ordinarily be made in money. But a delivery of other things, if accepted as payment by the other party, will discharge the debt in respect to which it is made. 2 Story on Cont., § 1342; *Tinsley v. Ryon*, 9 Tex. 405; Vol. 6, p. 421. Instances of this kind will be considered in the following sections:

§ 2. **Certificates of deposit.** A certificate of deposit, if accepted in payment of a debt, will operate as a discharge thereof. See *Lind-*

sey v. McClelland, 18 Wis. 481; *Leake v. Brown*, 43 Ill. 372. See *Burrows v. Bangs*, 34 Mich. 304. And a party who accepts "certificates of indebtedness" instead of money, in payment of his demand against the government, cannot afterward recover the difference in value. *Gibbons v. United States*, 2 Ct. of Cl. 421. But it is held that a certificate of deposit, payable in "Illinois currency," cannot be satisfied by depreciated paper; but that it must be met by bills passing in the locality, in the place of coin. *Chicago, etc., Ins. Co. v. Keiron*, 27 Ill. 501; *Hulbert v. Carver*, 37 Barb. 62; S. C. again, 40 id. 245.

§ 3. **Confederate notes.** It has been settled that contracts made within the insurrectionary States during the civil war, stipulating for payment in the money of the Confederate government, are valid if not made in aid of the rebellion, and payment made in Confederate currency would be a good discharge of the contract. *Thorington v. Smith*, 8 Wall. 1; *Hanauer v. Woodruff*, 15 id. 439; *Wilcoxon v. Reynolds*, 46 Ala. 529; *Rodgers v. Bass*, 46 Tex. 505. And see, on this subject, *Hale v. Wilkinson*, 21 Gratt. (Va.) 75; *Ritchie v. Sweet*, 32 Tex. 333; S. C., 5 Am. Rep. 245; *Mercer v. Wiggins*, 74 No. Car. 48; *McPherson v. Lynah*, 14 Rich. (So. Car.) Eq. 121; *Berry v. Bel-lows*, 30 Ark. 198; *Coleman v. Wingfield*, 4 Heisk. (Tenn.) 133; *Bond v. Perkins*, id. 364; *Pettis v. Campbell*, 47 Ga. 596. It has, however, been held in Alabama, that if the contract was for payment in "dollars," this term, *prima facie*, would be construed to mean dollars in the lawful money of the United States. *Taunton v. Mc-Innish*, 46 Ala. 619; *Wilcoxon v. Reynolds*, id. 529. And see *Cooksey v. McCreery*, 27 Ark. 303. But see *Mezeix v. McGraw*, 44 Miss. 100. After the civil war broke out, debtors in the insurrectionary States had no right to pay to the agents or trustees of their creditors in the loyal States debts due to these last in any currency other than legal currency of the United States. And payment in Confederate notes was held to have been no payment. *Fretz v. Stover*, 22 Wall. 198. And see *Taylor v. Thomas*, id. 479. But it was held that the receipt of Confederate money by the agent of a foreign (London) insurance company, in payment of premiums, was good payment and binding upon the corporation. *Robinson v. International Life Ass. Co.*, 42 N. Y. (3 Hand) 54; S. C., 1 Am. Rep. 490.

§ 4. **Counterfeit bank notes or coin.** In general, payment in forged paper, spurious bills, or in base coin, is not good (*Eagle Bank v. Smith*, 5 Conn. 71; *Baker v. Bonesteel*, 2 Hilt. [N. Y.] 397; *Ramsdale v. Horton*, 3 Penn. St. 330; *Anderson v. Hawkins*, 3 Hawks [No. Car.], 568); but this rule has no application to a payment made *bona fide* to a bank in its own notes. *United States Bank v. Bank*

of Georgia, 10 Wheat. 333. And see *Blount v. Windley*, 68 No. Car. 1; S. C., 12 Am. Rep. 616. And payment in counterfeit money for goods divests the title of the owner in favor of a subsequent *bona fide* purchaser for value. *Green v. Humphry*, 50 Penn. St. 212.

If a note is not what it purports to be, namely, a genuine note, it is nothing and may be treated as a nullity; and it is immaterial whether it be given in payment of an antecedent debt, or in exchange for goods immediately sold and delivered, or to be sold and delivered at a subsequent day. In the first case it would be no payment; in the second and third cases, there would be a total failure of the consideration; and the person who has parted with his property, in expectation of a consideration which has failed, may resort to his original cause of action. *Semmes v. Wilson*, 5 Cranch (C. C.), 285; *Thomas v. Todd*, 6 Hill, 340.

But the taker of counterfeit coin, or paper money which has been made legal tender by law, must use due diligence to ascertain its character and to notify the giver, to entitle him to recover its value. And any unnecessary delay beyond such reasonable time, as would enable the taker to inform himself as to its genuineness, operates as a fraud on the giver, and prevents a recovery. *Wingate v. Neidlinger*, 50 Ind. 520; *Lawrenceburgh Nat. Bank v. Stevenson*, 51 id. 594; *Atwood v. Cornwall*, 28 Mich. 336; S. C., 15 Am. Rep. 219. The question of reasonable time is one for the jury, to be decided by the circumstances of each case. *Simms v. Clark*, 11 Ill. 137; *Burrill v. Watertown Bank*, 51 Barb. 105. Where one accepted coin in payment for goods, after due inquiry, and then kept it for three years when he found it spurious, it was held that he could not recover from the vendee. *Curcier v. Pennock*, 14 Serg. & R. (Penn.) 51. That an action may be maintained to recover back money paid out for a counterfeit bill without an offer to return the spurious bill. See *Kent v. Bornstein*, 12 Allen, 342.

A payment made in unlawful money, pursuant to the agreement of parties, does not subject the party paying it to the penalties of the law by which such coin is prohibited. *Hoagland v. Post*, 1 N. J. Law, 32.

§ 5. **In current funds or notes.** On a promise to pay in paper currency, a demand is not necessary. All the reasons which dispense with a demand for specie apply to paper money, and the obligee must be sought and the medium brought to him. *Bain v. Wilson*, 1 J. J. Marsh. (Ky.) 202.

The words, "good current money," in a contract, will be understood to mean the coin of the constitution, or foreign coins made cur-

rent by act of congress, unless it appears that those terms have a different *local* signification. *Williams v. Moseley*, 2 Fla. 304; *Moore v. Morris*, 20 Ill. 255. And see *Ballard v. Wall*, 2 La. Ann. 404; *Hulbert v. Carver*, 40 Barb. 245.

Where a note is for dollars, payable by its terms *in specie*, the terms "in specie" mean that the designated number of dollars shall be paid in so many gold or silver dollars of the coinage of the United States. *Bronson v. Rodes*, 7 Wall. 229; *Tribblecock v. Wilson*, 12 id. 687; reversing S. C., 23 Iowa, 331. And a promissory note payable, in terms, in American gold, or executed subsequent to the passage of the legal tender act, is not discharged by a tender of United States treasury notes. *McGoon v. Shirk*, 54 Ill. 408; S. C., 5 Am. Rep. 122. But a note payable "in gold coin or the equivalent thereof in United States legal tender notes," is discharged by payment of legal tender notes, dollar for dollar. *Killough v. Alford*, 32 Tex. 457; S. C., 5 Am. Rep. 249. And it is held that the maker of a note due a bank has a right to tender in payment of such note, as equivalent to gold and silver coin, the bills issued by the bank. *Blount v. Windley*, 68 No. Car. 1; S. C., 12 Am. Rep. 616.

§ 6. **Depreciated or uncurrent notes.** Ordinarily, where bank bills are paid, there is an implied contract on the part of him who pays that they are current and will pass readily in mercantile and business transactions, as money. *Kottwitz v. Bagby*, 16 Tex. 656. And a creditor is not compellable to receive, in satisfaction of his debts, currency which is at a discount in the place where the debt is payable. *Howe v. Wade*, 4 McLean (C. C.), 319; *Braydon v. Goulman*, 1 T. B. Monr. (Ky.) 115. And payment in the bills of an insolvent bank is not a satisfaction of a debt, although at the time and place of payment the bills are in full credit and the parties to the transaction are wholly ignorant of such insolvency, if the bank was in fact insolvent previous to such payment. *Ontario Bank v. Lightbody*, 13 Wend. 101; *Townsend v. Bank of Racine*, 7 Wis. 185; *Magee v. Carmack*, 13 Ill. 289; *Frontier Bank v. Morse*, 22 Me. 88; *White v. Guthrie*, 1 J. J. Marsh. (Ky.) 503; *Fogg v. Sawyer*, 9 N. H. 365; *Westfall v. Braley*, 10 Ohio St. 188; *Wainwright v. Webster*, 11 Vt. 576. But see *Ware v. Street*, 2 Head (Tenn.), 609; *Scruggs v. Gass*, 8 Yerg. (Tenn.) 175; *Lowry v. Murrell*, 2 Port. (Ala.) 280; *Bayard v. Shunck*, 1 Watts & Serg. 92; *Edmunds v. Digges*, 1 Gratt. (Va.) 359. In the case last cited it is held that there is no implied warranty of the value of current money of the country, passing from hand to hand, in the course of trade, commerce and other business. And that this is true, not only of the money made by law a good tender in the pay-

ment of debts and performance of contracts, but is equally so in regard to the notes of banks and bankers payable to bearer and circulated by delivery. And see *Ridenour v. McClurkin*, 6 Blackf. (Ind.) 411.

But a bank, certifying in 1860 that one had deposited a sum of money "in current notes of the different banks of the State of North Carolina, which sum is payable in like current notes," was, in 1868, when the State bank notes had by depreciation become uncurrent, held to be liable in United States currency for the whole amount, with interest from the date of the demand. *Fort v. Bank of Cape Fear*, Phill. (No. Car.) L. 417.

The fact that a debt for which suit is brought arose from the receipt of the bills of a bank that was chartered illegally and for fraudulent purposes, and that the bills were void in law, and finally proved worthless in fact, is no defense to the suit where the bills themselves were actually current at the time the defendant received them, and did not prove worthless in his hands, and he is not bound to take them back from persons to whom he had paid them away. *Orchard v. Hughes*, 1 Wall. 73. See *Alexander v. Byers*, 19 Ind. 301; *Dakin v. Anderson*, 18 id. 52.

§ 7. **Bill, note or check as payment.** See Vol. 6, p. 414. A bill of exchange, promissory note, or other negotiable security, given by the debtor for an antecedent debt, only operates as a *conditional* payment unless the parties expressly or impliedly agree to consider it as an *absolute* payment. *Bank of United States v. Daniel*, 12 Pet. (U. S.) 32; *Sweet v. James*, 2 R. I. 270; *Nightingale v. Chaffee*, 11 id. 609; S. C., 23 Am. Rep. 531; *Blunt v. Walker*, 11 Wis. 334; *Coburn v. Odell*, 30 N. H. 540; *Moses v. Trice*, 21 Gratt. (Va.) 556; S. C., 8 Am. Rep. 609. It is the duty of him who seeks to avoid the payment of a debt, on the ground that he has given his promissory note for it, which has matured and which he has not paid, to show affirmatively, that, by stipulation, it was to be received as payment, or that the note was of such a character as to carry with it the legal inference that it was thus received. *Alford v. Baker*, 53 Ind. 279. And see *Young v. Hibbs*, 5 Neb. 433; *Edmond v. Caldwell*, 15 Me. 340; *Snow v. Perry*, 9 Pick. 539; *Doebbling v. Loos*, 45 Mo. 150; *May v. Gamble*, 14 Fla. 467; *Matteson v. Ellsworth*, 33 Wis. 488; 14 Am. Rep. 766; *Marshall v. Marshall* 42 Ala. 149; *Middlesex v. Thomas*, 20 N. J. Eq. 39. In Massachusetts, when a person, who is bound to the payment of a simple contract debt, gives his own promissory note for the debt, the presumption is that the note was accepted by the creditor in satisfaction of the debt. *Parham Sewing Machine Co. v. Brock*, 113 Mass. 194. Such presumption is, however, one of fact only, and may be rebutted

and controlled by evidence showing that such was not the intention of the parties. *Id.*; *Kimball v. The Anna Kimball*, 2 Cliff. 4; S. C., 3 Wall. 37; *Re Clap*, 2 Law Dec. 226. The rule is the same in Maine. *Milliken v. Whitehouse*, 49 Me. 527; *Ward v. Bourne*, 56 id. 161. So, in Wisconsin, taking a bill of exchange upon the previous indebtedness of the drawer to the payee is *prima facie* a payment of such indebtedness. And such taking becomes absolute payment if the payee or holder neglects to take proper steps to obtain payment of the bill, or to charge the drawer with liability on it if not paid. *Mehlberg v. Tisher*, 24 Wis. 607. See, also, *Maynard v. Johnson*, 4 Ala. 116; *Camp v. Gullett*, 7 Ark. 524; *Rowe v. Collier*, 25 Tex. (Supp.) 252; *Arnold v. Sprague*, 34 Vt. 402; *Wemet v. Missisquoi Lime Co.*, 46 id. 458.

Where a builder executes to the materialman a promissory note, payable in bank, for a balance due for materials, such note will operate as a *prima facie* payment of the account. *Hill v. Sloan*, 59 Ind. 182.

The taking of a bill or promissory note of a third person, in payment of an antecedent debt, will not *per se* operate to extinguish the debt, unless such be the agreement between the parties (*Whitbeck v. Van Ness*, 11 Johns. 409; *Wadlington v. Covert*, 51 Miss. 631; *Haines v. Pearce*, 41 Md. 221); and the burden of proving such agreement rests upon the defendant, the presumption of law in such case being that the bill or note is taken as conditional payment only. *Id.*; *Nightingale v. Chafee*, 11 R. I. 609; S. C., 23 Am. Rep. 531. And it is held that, where a debtor gives to his creditor, in full payment and discharge of his debt, the promissory note of a third person who had previously failed, and become insolvent, though that fact was unknown to the parties, at the time of the transfer, the creditor may rescind the contract, unless it appear that he agreed to receive the note in payment whether the maker had failed or not. *Roberts v. Fisher*, 43 N. Y. (4 Hand) 159; S. C., 3 Am. Rep. 680; S. C. again, 65 Barb. 303. Where a vendor of goods receives a part of the price in cash and accepts the note of a third person for the balance, and agrees to run the risk of its being paid, where such agreement was founded upon the fraudulent representations of the vendee that the note was good and would be paid at maturity, the vendor, on non-payment of the note and the insolvency of the maker, and on due notice to the vendee and demand of payment for the balance due on the goods, may recover that amount from the vendee. *Hooper v. Strasburgher*, 37 Md. 390; 11 Am. Rep. 538. See *Wiseman v. Lyman*, 7 Mass. 286; *Harris v. Johnston*, 3 Cranch, 311; *Sard v. Rhodes*, 1 Mees. & W. 153. In *Gibson v. Tobey*,

46 N. Y. (1 Sick.) 637; S. C., 7 Am. Rep. 397, it is held that where the vendor of goods receives from the vendee, at the time of the delivery, the note or bill of a third person, the presumption is that the note or bill was accepted in payment and satisfaction, unless the contrary be expressly proved by the vendor. And see *Rew v. Barber*, 3 Cow. 272; *Perkins v. Cady*, 111 Mass. 318. And a seller, who has been induced by fraud to receive in payment the note of a third party, cannot maintain an action on the contract of sale until he has offered to return the note, unless he proves it absolutely worthless. *Estabrook v. Swett*, 116 Mass. 303.

It seems to be pretty well settled that the delivery of a check is not a payment, unless there be an agreement to that effect, or unless the drawer in consequence of some laches on the part of the holder has sustained loss or injury in respect thereof, and then only *pro tanto*. *Sweet v. Titus*, 67 Barb. 327; *Kermeyer v. Newby*, 14 Kans. 164; *Larue v. Cloud*, 22 Gratt. (Va.) 513; *Stevens v. Park*, 73 Ill. 387; *Phillips v. Bullard*, 58 Ga. 256. But it is held that when the holder of a check presents the same to the drawee when due, and procures it to be certified instead of paid, it is as between him and the drawer a payment, and the latter is discharged from liability thereon. *First National Bank v. Leach*, 52 N. Y. (7 Sick.) 350; S. C., 11 Am. Rep. 708. But see *Andrews v. German National Bank*, 9 Heisk. (Tenn.) 211; S. C., 24 Am. Rep. 300, holding that the drawer of a check is not relieved from liability by the fact that the drawee has certified the check to be "good."

§ 8. **Payment in bonds.** A bond has no analogy to cash, and giving a bond is no payment. *Taylor v. Higgins*, 3 East, 169. Thus, giving a bond for the debt of another is not payment, and an action for money paid will not lie against the person for whose debt the bond was given. *Cumming v. Hackley*, 8 Johns. 202. So, a bond will not be considered as payment of money due upon a mortgage, where there is no evidence of its being received as satisfaction. *Hamilton v. Callender*, 1 Dall. (Penn.) 420. And the execution of a bond by the principal and his wife, for the amount of a judgment against him and his sureties, is not, *per se*, a legal satisfaction of the judgment. *Covington v. Clark*, 5 J. J. Marsh. (Ky.) 59. Nor is the taking of a new bond an extinguishment of a prior bond, and the obligee may proceed upon either. *Bailey v. Wright*, 3 McCord (So. Car.), 484. But taking a bond and warrant of attorney from one of two partners, for a partnership debt, extinguishes the liability of the other copartner. *Averill v. Loucks*, 6 Barb. 19. See *Howell v. Webb*, 2 Ark. 360. So, the execution of a bond and mortgage furnishes a presumption of the liquida-

tion of all prior accounts between the parties, liable to be negated by proof. *Chewning v. Proctor*, 2 McCord's (So. Car.) Ch. 11.

The receipt of a bond of a third person "in part payment" of a preceding debt, was held to be conclusive evidence that the bond was received in payment to that extent, although the obligor was insolvent when the receipt was given. *Muir v. Geiger*, 1 Cranch (C. C.), 323.

§ 9. **Payment in notes, orders, etc.** In an action upon a book debt, it is no defense that a note, not negotiable, was given to the plaintiff for the same amount. *Bartlett v. Mayo*, 33 Me. 518. So, an un-negotiable order and acceptance, receipted for by the plaintiff as payment of a precedent debt, does not preclude an action for the same debt unless specially so agreed. *Jose v. Baker*, 37 id. 465. And see *Nissen v. Tucker*, 1 Jones' (No. Car.) L. 176; *Hoar v. Clute*, 15 Johns. 224; *Chapman v. Coffin*, 14 Gray, 454. But if a creditor takes conditionally a cash order drawn upon him, in satisfaction of his debt, the debt will be paid as soon as the condition is performed, and this immediately if the condition is already performed, although that fact be not ascertained until some time afterward. *Waite v. Vose*, 62 Me. 184. A town order, delivered and accepted, operates as a satisfaction, and the remedy is only on the order, which cannot be prosecuted till presented for payment. *Dalrymple v. Whittingham*, 26 Vt. 345. See, also, *Farwell v. Salpaugh*, 32 Iowa, 582. But a town order delivered by a debtor to his creditor, for the purpose of paying the debt and received for that purpose, both acting in good faith, is no payment, if, at the time, it was utterly worthless through want of authority of the drawers and acceptors. *Hussey v. Sibley*, 66 Me. 192; S. C., 22 Am. Rep. 557.

In Vermont, taking an order for the amount of a demand has been held not to impair the right to sue on the original demand, where the order was taken "without prejudice" and was not shown to have been negotiable, although it was not produced on the trial. *Rogers v. Shelburne*, 42 Vt. 550. A agreed to receive payment for a debt due from B by an order of C for hardware, if such order was accepted. C, instead of giving an order, executed a note on which A was unable to obtain hardware, and it was held that B was not discharged from his debt. *Surdam v. Lyman*, 36 Vt. 733.

Where *before* a note is due, a part of the debt is paid and a new note executed for the residue by the debtor, and an express agreement is made between the parties that the old note shall be surrendered, such agreement is founded upon a valuable consideration and extinguishes the old note, and no action can be maintained upon it. *Bantz v. Basnett*, 12 W. Va. 772; Vol. 1, p. 92.

To constitute payment, there must be privity between the parties. And where A delivers his note to B, under an agreement that it is to be received in discharge of a prior note executed by A to B, which the latter has assigned without A's knowledge, it does not discharge the original note (*Newman v. Henry*, 29 Ark. 496); and where, in such case, the subsequent note is transferred by the payee to the assignee of the original note, and the latter has knowledge of the facts and circumstances, and refuses to surrender the original note, he acquires no title to the subsequent one. *Id.*

Under an agreement to pay for certain land sold, in specified articles, it appearing that the vendee had accepted an order from the vendor for a part of the articles, and had delivered them, it was held to be competent for the vendor to prove that the vendee had afterward brought a suit for the value of the articles so delivered against those who had received them, and recovered the value thereof. *Allen v. Woods*, 24 Penn. St. 76.

§ 10. **Payment in other securities.** Where a mortgage is given as collateral security for notes and drafts, and not in satisfaction thereof, the latter will not be extinguished by the former. *Averill v. Loucks*, 6 Barb. 470. So, the transfer of the mortgage of a third person for a pre-existing debt is not an extinguishment of the indebtedness, unless it is expressly so agreed. *Coonley v. Coonley*, Hill & Denio (N. Y.), 312. But a payment in property or securities, if received as a full satisfaction, is good, where one person is bound to pay money for the use of another. *Ralston v. Wood*, 15 Ill. 159. If a creditor accept a deed of land in payment of his debt, it is a bar to an action for the debt; and if the title be defective the creditor must look to his warranty. *Miller v. Young*, 2 Cranch (C. C.), 53; *Hays v. Smith*, 4 Ill. 427.

Where a mortgage is given to secure the payment of purchase-money, and subsequently a draft is given for the amount and dishonored, this is not an extinguishment of the mortgage, but only a mode of payment, and, if the holder uses due diligence and cannot collect, he may resort to his mortgage. *De Yampert v. Brown*, 28 Ark. 166.

A debt is not extinguished by accepting an obligation of equal dignity. *Hart v. Boller*, 15 Serg. & R. 162; *Bowers v. State*, 7 Har. & J. (Md.) 32. In order to produce that effect it must be one of a higher grade. *Id.* See Vol. 6, p. 414 *et seq.*

ARTICLE III.

APPLICATION OF PAYMENT.

Section 1. In general. See Vol. 1, p. 176 *et seq.* The general rule promulgated by both courts of law and courts of equity as to the application of payment is, that where money is paid by, or received for a debtor by his creditor, the debtor has a right to make the appropriation to what purpose he pleases. If the debtor makes no appropriation, then the creditor may apply it to the satisfaction of any demand which he has against his debtor, at his own pleasure. If neither party make any such application, then, if there are various debts due to the creditor, the court will make the application according to its own view of the law and equity of the case, under all the circumstances. *United States v. Wardwell*, 5 Mas. (C. C.) 82, 85; *United States v. Kirkpatrick*, 9 Wheat. 720; *Leef v. Goodwin*, Taney (C. C.), 460; *Copland v. Toulmin*, 7 Cl. & Lin. 350; *Youmans v. Heartt*, 34 Mich. 397. But this right of appropriation is one strictly existing between the original parties, and no third person has any authority to insist upon an appropriation of such money in his own favor, where neither the debtor nor the creditor have made or required any such appropriation. *Gordon v. Hobart*, 2 Story (C. C.), 243.

§ 2. **Application by the debtor.** The right of a debtor making a payment of money to direct how it shall be appropriated is undisputed (*Beun v. Brown*, 54 N. H. 395; *Champenois v. Fort*, 45 Miss. 355); and the creditor cannot, without the assent of the debtor, change such appropriation. *Jackson v. Bailey*, 12 Ill. 159; *Calvert v. Carter*, 18 Md. 73; *Sherwood v. Haight*, 26 Conn. 432; *Treadwell v. Moore*, 34 Me. 112; *Irwin v. Paulett*, 1 Kans. 418; *Semmes v. Boyken*, 27 Ga. 47. A direction as to the mode of application of a payment may be implied from circumstances. *Hansen v. Rounsavell*, 74 Ill. 238. An agreement before payment, or even the expression of a wish on the part of the debtor as to how a payment shall be applied, will amount to a direction to that effect. *Ib.* If payment is offered on an account not due, the creditor need not receive it, yet, if he does receive it he is bound to apply it in accordance with the directions of the debtor. *Wetherell v. Joy*, 40 Me. 325. The receipt of money for a defined use amounts to an agreement on the part of the person receiving it that he will not apply it to any other. *Smuller v. Union Canal Co.*, 37 Penn. St. 68.

The intention to appropriate a payment to a particular debt may be collected from the nature of the transaction. *West Branch Bank v.*

Moorehead, 5 Watts & Serg. (Penn.) 542. And any acts which manifest to the creditor the intent of the debtor to make a particular appropriation of a payment are sufficient so to appropriate it. *Terhune v. Colton*, 12 N. J. Eq. 233. The appropriation may be proved by circumstances as well as by words. *Mitchell v. Dall*, 2 Harr. & J. (Md.) 159; *Howland v. Rench*, 7 Blackf. (Ind.) 236; *Ilseley v. Jewett*, 2 Mete. (Mass.) 168.

But the rule that a debtor may appropriate payments as he pleases applies only to voluntary payments, and not to those made by process of law. *Blackstone Bank v. Hill*, 10 Pick. 129.

§ 3. **Application by the creditor.** It is a well-settled rule that when a partial payment is made by a person indebted on more than one account, if there has been no actual appropriation by the debtor, at or before the time of payment, the creditor may apply it as he pleases (*Watt v. Hoch*, 25 Penn. St. 411; *Johnson v. Johnson*, 30 Ga. 857; *Whitaker v. Groover*, 54 id. 174; *Bobe v. Stickney*, 36 Ala. 482; *Bird v. Davis*, 14 N. J. Eq. 467; *Jones v. Williams*, 39 Wis. 300); unless there are circumstances that would render the exercise of such discretion on the part of the creditor unreasonable, and enable him to work injustice to his debtor. *Arnold v. Johnson*, 2 Ill. 196; *Taylor v. Coleman*, 20 Tex. 772.

In applying a payment not applied by the debtor, he may, however, credit it on a just and valid demand, whether the correctness of such demand be assented to by the debtor or not. *McLendon v. Frost*, 57 Ga. 448. See, also, *Lee v. Early*, 44 Md. 80. And even if it would not support an action, as, for instance, a debt on which no action would lie by reason of the statute of frauds (*Haynes v. Nice*, 100 Mass. 327; S. C., 1 Am. Rep. 109; *Murphy v. Webber*, 61 Me. 478); or because the demand was barred by the statute of limitations. *Armistead v. Brooke*, 18 Ark. 521; *Jackson v. Burke*, 1 Dill. (C. C.) 311. See, also, *Thurlow v. Gilmore*, 40 Me. 378. But if a creditor holds two demands, one lawful and another positively unlawful, as, for instance, a claim for usurious interest, he cannot apply a general payment by the debtor to the illegal demand (*Rohan v. Hanson*, 11 Cush. 44; *Greene v. Tyler*, 39 Penn. St. 361); without the consent of the debtor, express or implied. Id.; *Phillips v. Moses*, 65 Me. 70. It is not necessary that such consent should be embodied in any set form of words; it may be inferred from acts, circumstances, course of dealing, knowledge of such appropriation by the creditor and tacit consent thereto, as well as by words evincive of an intention to make such appropriation, or of assent to such appropriation already made by the creditor. Id.

A creditor, who receives a bill of exchange from his debtor, with

directions to pay a part of its value to another creditor, has no right to appropriate all the money collected from the bill to the payment of his own debt. *Hall v. Marston*, 17 Mass. 575. And if an agent, having a demand himself against a debtor, and also acting for a principal, who has a demand against the same debtor, receives money from the debtor not appropriated by him to either demand, he must ratably apply the payment to both demands. *Cole v. Trull*, 9 Pick. 325. If one member of a firm makes a payment to a person who has an account against him, and also against the firm, it has been held that the creditor must apply the payment to the individual account, unless he can show a consent to have it otherwise applied. *Johnson v. Boone*, 2 Harr. (Del.) 172. And after the dissolution of a partnership, if one of the partners continues to deal with a former creditor of the firm, and makes payments to him, the creditor may apply such payments to the individual debt. *Sneed v. Weister*, 2 A. K. Marsh. (Ky.) 277. If one indebted individually, and also jointly, with another, to the same creditor, makes a general payment, without specifying the application, the creditor may apply it to either account, as he may choose; and he may apply it to the joint account, though he have given the party making the payment a receipt, as for money paid by him, and in which the name of the other joint debtor is not mentioned. *Van Rensselaer v. Roberts*, 5 Denio, 470.

The holder of two notes of the same maker, receiving from him in part payment a sum smaller than either, can, in the absence of any appropriation by him, apply the whole upon either, but not half upon each note, without the debtor's approbation. *Wheeler v. House*, 27 Vt. 735. If, in such case, the payment is sufficient to extinguish one of the notes, bringing suit upon the other is an election to appropriate the payment to discharge the former. *Starrett v. Barber*, 20 Me. 457.

If some of the debts are secured, but others are not, and the debtor makes a general payment, without directing any special appropriation of the money, the creditor may apply the money to those debts which are not secured, and still retain his rights as to the secured debts. *Hutchinson v. Bell*, 1 Taunt. 558; *Clark v. Burdett*, 2 Hill (N. Y.), 197; *Langdon v. Bowen*, 46 Vt. 512. And if some of the items would be barred by the statute of limitations, the creditor may apply a general payment to them, and sue upon those not barred by the statute. *Williams v. Griffith*, 5 Mees. & W. 300; *Mills v. Fowkes*, 5 Bing. N. C. 455.

That the deposit of money in a bank generally creates the relation of debtor and creditor between the bank and the depositor is well set-

tled. Vol. 1, p. 502; *Bank of Republic v. Millard*, 10 Wall. 152; *First Nat. Bank v. Whitman*, 94 U. S. (4 Otto) 343. And where a person is indebted to a bank on a note, and he makes a general deposit of a sum of money in such bank, without appropriating it to the payment of such note, the bank has a right, at any time after the note becomes due, to appropriate it to the payment of such note. And the omission to do so until after a judgment is recovered by the bank upon the note, does not affect the right to do so at any time when an action is brought by the depositor, or his assignee, for the recovery of the amount deposited. *Marsh v. Oneida Central Bank*, 34 Barb. 298. Where, after the maturity of a promissory note held by a bank, and due protest and notice thereof, the maker makes a general deposit in the bank of an amount sufficient to pay the note, this does not of itself, as between the bank and an indorser, operate as a payment. In the absence of any express agreement or directions, it is optional with the bank whether or not to apply the money in payment; it is under no legal obligation to do so. *National Bank of Newburgh v. Smith*, 66 N. Y. (21 Sick.) 271; S. C., 23 Am. Rep. 48.

§ 4. **Application made is conclusive.** An application of funds to the payment of a debt, once made in good faith by a creditor or debtor, cannot be interfered with. *Muskingum v. Carpenter*, 7 Ohio, Part 1, 21; *Mayor of Alexandria v. Patten*, 4 Cranch, 317; *Simson v. Ingham*, 2 Barn. & C. 65. Even where a debtor has directed payments made by him to his creditor to be applied to the satisfaction of an illegal claim, he cannot afterward require them to be otherwise appropriated. *Caldwell v. Wentworth*, 14 N. H. 431; *Hubbell v. Flint*, 15 Gray, 550. And see *Plummer v. Erskine*, 58 Me. 59; *Mueller v. Wiebracht*, 47 Mo. 468. Thus where an account consisted in part of charges for liquors sold in violation of law, and there were payments credited on account, and it had been agreed between the parties that the payments as they were made should be applied first upon the charges for liquors sold, it was held that, though the agreement was void, and though the amount paid for the liquors could under the statute be recovered back in a proper suit, yet so far as the payments had been already so applied under the agreement, they could not be diverted from that application, and applied to the other items of the account. *Tomlinson, etc., Co. v. Kinsella*, 31 Conn. 268. And see *ante*, p. 414, § 2.

When a payment has been made by one of two joint debtors, it extinguishes so much of the debt due; and the payment cannot be afterward applied, even by the agreement of the creditor and paying debtor, to any other indebtedness (*Thayer v. Denton*, 4 Mich. 192); so, if a

party acknowledges the receipt of a certain amount in payment of a debt due from a firm, he will not afterward be permitted to apply it to a private debt of one of the partners, although the payment was made by that partner (*Brown v. Brabham*, 3 Ohio, 275); so, if money has been paid by a judgment debtor, and appropriated by the creditor to the payment of the judgment debt rather than to other debts then existing, the court will not suffer that appropriation to be changed so as to affect the rights of third persons. *Chancellor v. Schott*, 23 Penn. St. 68.

And where a creditor has two claims against his debtor, and a payment made was designed to be on account of one, but was credited in fact to the other, with the consent of the debtor, he cannot afterward, in the absence of any agreement to change the application of the money, insist that there was error in the credit. *Dorsey v. Wayman*, 6 Gill (Md.), 59.

A payment made by a debtor to his creditor cannot be applied by the creditor to a debt arising subsequently, without the assent of the debtor. *Law v. Sutherland*, 5 Gratt. (Va.) 357; *Baker v. Stackpoole*, 9 Cow. 420.

§ 5. **Application by the court.** We have seen that when a payment is made by a debtor to a creditor holding several demands against him, the debtor has the right to direct the claim to which it shall be appropriated. *Ante*, § 2, p. 414. If he fails to do so, the creditor has the right to appropriate at his election. *Ante*, § 3, p. 415. But in the absence of any particular application of a payment by either the debtor or creditor, the law will apply it, usually, as the justice and equity of the case may require. *Callahan v. Boazman*, 21 Ala. 246; *Proctor v. Marshall*, 18 Tex. 63; *Oliver v. Phelps*, 20 N. J. Law, 180; *Starrett v. Barber*, 20 Me. 457; *Selleck v. Turnpike Co.*, 13 Conn. 453; *Youmans v. Heartt*, 34 Mich. 397; *Pierce v. Knight*, 31 Vt. 701. In general, the law will apply a payment to the earliest debt due at the time of payment, if there is no particular equity or reason for a different course. *Thompson v. Phelan*, 22 N. H. 339; *Milliken v. Tufts*, 31 Me. 497; *St. Albans v. Failey*, 46 Vt. 448. But the law is not so imperative as to authorize the jury to be directed to apply the payment to the oldest claim. *Killorin v. Bacon*, 57 Ga. 497. Where some of the debts are certain, or capable of being rendered so, and the others are founded upon claims for uncertain or unliquidated damages, the law will apply the payment to the certain demand instead of the uncertain one. *Ramsour v. Thomas*, 10 Ired. (No. Car.) 165. Where it is proved that a payment was made in a certain year, but the day and month cannot be shown, the court will direct the credit to be

given as of the last day of the year, a day most favorable to the creditor. *Byers v. Fowler*, 14 Ark. 86. Where a tenant who had contracted to pay the rent out of the first cotton picked, ginned, and baled, and was indebted to the landlord for supplies, delivered enough cotton to pay the rent, but not the other indebtedness, without any directions as to its application, it will be applied to the payment of the rent. *Cross v. Johnson*, 30 Ark. 396. And payments, made by a tenant to his landlord on account of rent, generally will, in the absence of any direction by the tenant, and any agreement of the parties, be applied by the law on the rent due at the time, and not on the rent then accruing. *Hunter v. Osterhoudt*, 11 Barb. 33. So, payments made generally on a bond will be appropriated to the installments then due. *Seymour v. Sexton*, 10 Watts (Penn.), 255. When a payment is made by one, who is under a several, and also under a joint liability to the same party, and the money is not known to be derived from the fund from which the joint liability was to be met, the law applies it to discharge the several liability as being the appropriation most favorable to the creditor, unless it is shown by the evidence that a different appropriation was intended. *Livermore v. Claridge*, 33 Me. 428. Partial payments unappropriated by the payer, on several demands, only one of which was lawful, should all be applied to such single valid one, irrespective of its order in the account. *Backman v. Wright*, 27 Vt. 187. When a debtor makes a payment to a creditor who has two demands against him, both due, and neither party applied the payment, and one of the demands afterward becomes barred by the statute of limitations, the law will apply it to the demand which is barred. *Robinson v. Allison*, 36 Ala. 525.

The court will not, generally, exercise the power of appropriating payments when an appropriation has already been made by either debtor or creditor. And when the appropriation devolves upon the court, the paramount rule is, that whenever the intention or understanding of the parties, before or at the time, can be inferred or implied from any circumstances, it shall prevail. *Emery v. Tichout*, 13 Vt. 15; *Ramsour v. Thomas*, 10 Ired. (No. Car.) 165. A payment voluntarily made in fulfillment of an illegal contract will not be withdrawn by the court, in order that the money may be applied in payment of a just debt. *Feldman v. Gamble*, 26 N. J. Eq. 494.

§ 6. **Running accounts.** In the absence of any appropriation by the parties, a payment made on an account current is to be applied to the earlier items (*Fairchild v. Holly*, 10 Conn. 175; *Sprague v. Hazenwinkle*, 53 Ill. 419; *Wendt v. Ross*, 33 Cal. 650; *Shedd v. Wilson*, 27 Vt. 478; *Postmaster-General v. Furber*, 4 Mas. [C. C.]

333; *Harrison v. Johnston*, 27 Ala. 445; *Dows v. Morewood*, 10 Barb. 183) even where the creditor has security for those items, and none for the later ones. *Truscott v. King*, 6 N. Y. (2 Seld.) 147; *Cushing v. Wyman*, 44 Me. 121; *Worthley v. Emerson*, 116 Mass. 374; *Moore v. Gray*, 22 La. Ann. 289. Another rule in such case is, to apply the payment in the way most beneficial to the creditor; thus, where there are several debts, to the one least secured, unless such course is to the prejudice of a surety. *Pierce v. Sweet*, 33 Penn. St. 151.

If a party indebted upon a running account, partly for legal and partly for illegal sales, make payments generally upon account, those payments are to be applied to the items of charge for legal sales. But if at any time the amount paid exceed the amount due for legal sales, the balance will be applied to pay for the goods illegally sold. *Hall v. Clement*, 41 N. H. 166.

The presumption that payments made on an account current are to be applied in the discharge of the earliest items in the account is not rebutted by the fact that those items are for goods sold on condition that they shall not become the property of the purchaser till paid for. And this is so, although a memorandum of the condition is entered by the seller in his books containing the account. *Crompton v. Pratt*, 105 Mass. 255.

§ 7. **Debts with different securities.** Where the debts due by a debtor to his creditor are of different characters, and a general payment is made, and neither party applies the payment at the time, the law will then apply it, upon the presumed intention of the debtor, to that debt a relief from which will be most beneficial to him. Thus, if the debts be a mortgage and an account, or a judgment and an account, the law will apply the payment to the mortgage or judgment in preference to the account, because the former would bear more heavily on the debtor. *Pattison v. Hull*, 9 Cow. 747; *The Ship Antarctic*, 1 Sprague, 206; *Dorsey v. Gassaway*, 2 Harr. & J. (Md.) 402; *Neal v. Allison*, 50 Miss. 175; *Windsor v. Kennedy*, 52 id. 164. But it has been held, that the law in such case will apply the payment as will be most beneficial to the creditor. *Gwinn v. Whitaker*, 1 Harr. & J. (Md.) 754; that is, if there are separate demands, part of which are secured and part not secured, the application will be made on those not secured. *Langdon v. Bowen*, 46 Vt. 512. And if a creditor makes an application of a payment, not applied by his debtor, generally on an open account, the law will not afterward apply it to the payment of a judgment, even if older than the account, especially if the creditor has security for the judgment and not for the account. *Watt v. Hoch*, 25 Penn. St. 411.

It was held in New York, that where a payment is made, even by judgment of the court, without directing its application as between several securities, the court, in subsequently determining the application, should do so upon equitable principles, and is not bound to apply the payment to the elder security. *Campbell v. Vedder*, 1 Abb. Ct. App. (N. Y.) 295; S. C., 3 Keyes, 174. And see *State v. Thomas*, 11 Ired. (No. Car.) L. 251; *Field v. Holland*, 6 Cranch, 8; *Smith v. Wood*, 1 N. J. Eq. 74; *Bosley v. Porter*, 4 J. J. Marsh. (Ky.) 621; *Chester v. Wheelwright*, 15 Conn. 562. In *Simmons v. Cates*, 56 Ga. 609, it was held that the assignee of two judgments from different plaintiffs against the same defendant, on the older of which judgments there is a security, and on the younger there is none, must apply money raised by the sheriff from the defendant's property to the older judgment. And if he applies it to the younger, the surety is discharged *pro tanto*.

If there be no appropriation of a payment made by either of the parties, the law will appropriate it, other considerations being equal in the first instance, to the payment of a note absolutely due to the creditor, rather than to the payment of one transferred to him as collateral security only. *Bank of Portland v. Brown*, 22 Me. 295.

§ 8. **Principal and interest.** A debtor owing a debt consisting of principal and interest, and making a partial payment, has a right to direct its application to so much of the principal, in exclusion of the interest; and the creditor, if he receives it, is bound to apply it accordingly. *Pindall v. Bank of Marietta*, 10 Leigh (Va.), 484. But in applying payments, in the absence of any agreement to the contrary, the interest due is first to be satisfied, and the balance of the payment is to be applied to diminish the principal. *Moore v. Kiff*, 78 Penn. St. 96; *Mills v. Saunders*, 4 Neb. 190; *Freeman's Bank v. Rollins*, 13 Me. 202. If the payment falls short of the interest due, the balance of interest is not to be added to the principal, but to be set apart and to be extinguished by the next payment, if sufficient. *Hart v. Dorman*, 2 Fla. 445; *Peebles v. Gee*, 1 Dev. (No. Car.) L. 341; *Hearn v. Cutberth*, 10 Tex. 216; *Bond v. Jones*, 16 Miss. 368; *Lash v. Edgerton*, 13 Minn. 210; *McFadden v. Fortier*, 20 Ill. 509. But see *Union Bank v. Lobdell*, 10 La. Ann. 130. If neither principal nor interest is due, the payment is applied to the extinguishment of principal and interest ratably. *Jencks v. Alexander*, 11 Paige, 619. See *Starr v. Richmond*, 30 Ill. 276.

A payment of usury will be applied in law to the payment of the debt legally due. *Parchman v. McKinney*, 20 Miss. 631; *Burrows v. Cook*, 17 Iowa, 436; *Stanley v. Westrop*, 16 Tex. 200; *Bartholomew*

v. *Yaw*, 9 Paige, 165; *Duncan v. Helm*, 22 La. Ann. 418. But the right of the borrower to insist that payments of usurious interest shall be applied in extinguishment of the principal, though a legal right, is not to the full extent an equitable one. And if a borrower goes into equity for relief upon a usurious contract, the court will compel him to pay the principal and legal interest, because he is under a moral obligation to do so. *Welch v. Wadsworth*, 30 Conn. 149.

In some of the States it has been held that when it becomes necessary for the court to direct to what debt a payment shall be applied, it should direct that it be applied to a debt which subjected the party to interest in preference to one which did not bear interest. *Blanton v. Rice*, 5 T. B. Monr. (Ky.) 253; *Bussey v. Gant*, 10 Humph. (Tenn.) 238. In Wisconsin, where moneys were received by a lender of money as the proceeds of notes turned over to him by the borrower, and the evidence does not show that the latter ever consented to their being applied as payments of interest, the court will apply them wholly to the extinguishment of the principal. *Fay v. Lovejoy*, 20 Wis. 403.

§ 9. **Rights of third persons.** See *ante*, p. 414, § 1. If several notes are joined in one suit, and the execution recovered in such suit is satisfied only in part, a surety for some of the notes may insist upon a proportional application of the money for which he is liable. *Blackstone Bank v. Hill*, 10 Pick. 129.

And if a payment is made generally to a party who holds a debt due to himself, and another due to himself and the plaintiff, he is bound, as between himself and the plaintiff, to apply the payment ratably upon the two debts. *Colby v. Copp*, 35 N. H. 434.

It is an established principle, that payment will not be permitted in equity to operate as an extinguishment, against those equitably entitled to substitution in the place of the party receiving payment. *Richardson v. Washington Bank*, 3 Mete. 536; *Morris v. Oakford*, 9 Penn. St. 498; *Eddy v. Traver*, 6 Paige, 521; *Matter of Foot*, 8 Benedict, 228.

§ 10. **Who may interpose defense.** See *ante*, pp. 379, 382, 383, Art. 1, §§ 1, 3 and 4.

§ 11. **How interposed.** Payment must be pleaded. *McKyring v. Bull*, 16 N. Y. (2 Smith) 297; *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. (6 Tiff.) 443; *Martin v. Pugh*, 23 Wis. 184. Unless pleaded, it cannot be given in evidence (*Id.*), even for the purpose of showing that no interest was due on an admitted debt (*Adams v. Palk*, 3 Q. B. 2); nor can it be shown in mitigation of damages, although a set-off on an account stated be pleaded (*Cooper v. Morecroft*, 3 Mees. & W. 500); and the defendant proves entries of payments in the hand-

writing of the plaintiff. *Linley v. Polden*, 3 Dowl. Pr. Cas. 780. And see *Speck v. Phillips*, 5 Mees. & W. 282. Payment of a smaller sum cannot be pleaded in satisfaction of a greater (*Down v. Hatcher*, 10 Ad. & El. 121; *Walan v. Kerby*, 99 Mass. 1), unless some agreement founded on good consideration, be shown for giving up the residue (*Lewis v. Jones*, 4 Barn. & C. 506; *Langdon v. Langdon*, 4 Gray, 189), or there be a release under seal of the residue. 2 Chit. Plead. (16th Am. ed.) 445.

Under plea of payment the defendant cannot give evidence tending to disprove the cause of action set forth in the declaration. *Hamilton v. Moore*, 4 Watts & Serg. 570. But under such plea the evidence may be of payment in other things than money. *Id.*

CHAPTER LIII.

PERFORMANCE.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition and nature. Performance is the most direct contradiction and the most complete defense against actions for the breach of contracts. To make the defense effectual, the performance must have been by him who was bound to perform. And where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible; but this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied. *Taylor v. Caldwell*, 3 B. & S. 826; 32 L. J. Q. B. 164; 11 W. R. 726; 8 L. T. (N. S.) 356; *Noble v. Jones*, 2 Grant's Cas. (Penn.) 278; *Pullman v. Corning*, 9 N. Y. (5 Seld.) 93. So where the performance of work to be done is to precede payment, and is a condition thereof, the contractor, having substantially failed to perform on his part, cannot recover for his labor and materials, notwithstanding the owner has chosen to enjoy the benefit of the work done. *Harris v. Rathbun*, 2 Abb. (N. Y.) App. Dec. 326. But where there has been a substantial and *bona fide* compliance on the part of the plaintiff, with his contract, he shall not be precluded from a recovery of his compensation, on account of some light imperfection, for which the defendant may be compensated in damages. *Noble v. James*, 2 Grant's Cases (Penn.), 278; *Phillip v. Gallant*, 62 N. Y. (17 Sick.) 256, 264.

§ 2. **Notice or demand of performance.** When the fact or circumstance, on which the performance of a contract depends, lies more particularly in the knowledge of the promisee than of the promisor, the former must give the latter notice. *Chase v. Sycamore, etc., R. R. Co.*, 38 Ill. 215. And see *ante*, p. 364, chapter on Notice of Demand before Action, and cases there cited. As where one has his own time for performing certain acts, upon the performance of which, money was to

fall due to him from another, but which he could perform without the knowledge or concurrence of that other, notice of the performance of the acts is necessary before an action can be maintained for the money. *Fitts v. Hoitt*, 17 N. H. 530. And where the time for the performance of a contract to deliver goods is indefinitely extended by the agreement of the parties, a demand and tender are necessary to sustain an action for non-performance. *Newton v. Wales*, 3 Rob. (N. Y.) 453. But when an agreement is made to deliver stock at any time within sixty days, a demand of performance on the part of the vendee is not necessary to establish a right of action to recover damages for a breach of the contract. *Wheeler v. Garsia*, 5 Rob. (N. Y.) 280.

A party who, by his own act, incapacitates himself from performing his contract, makes himself thereby at once liable for a breach of it, and dispenses with the necessity of any request that he will perform it by the party with whom the contract is made. *Lovelock v. Franklin*, 8 Q. B. 371; 10 Jur. 246; 15 L. J. Q. B. 146; *Short v. Stone*, 3 D. & L. 580; 10 Jur. 245; 15 L. J. Q. B. 143; *Caines v. Smith*, 15 M. & W. 189; 3 D. & L. 462; 15 L. J. Exch. 106; *Boyle v. Guysinger*, 12 Ind. 273. And a vendor who refuses to rescind for non-payment at the day, upon an offer to that effect by the vendee, waives all right to insist on forfeiture for non-payment until he has subsequently made a demand of payment. *Prophit v. Robinson*, 34 Miss. (5 George) 141.

An agreement to pay for services "at the rate of \$60 per month in gold bullion, valued at \$16 per ounce, in gold coin of the United States," is an agreement for the payment of money within the meaning of the rule which requires a demand where payment is to be made in specific articles, but dispenses with it when the payment is to be made in money. *Counsel v. Vulture Mining Co.* 5 Daly (N. Y.), 74.

By the terms of a written contract, one party thereto bound himself to deliver to the other a specified amount of a certain kind of chattels, at a place therein designated, "at the option of the" latter, "at any time" during a specified period. In a suit by the former, against the latter, for a breach of such contract, it was held that it was the duty of the latter to have notified the former as to what time during such period such delivery should be made. *Posey v. Scales*, 55 Ind. 282.

§ 3. **What is a sufficient performance.** The only general rule upon this point is, that the performance must be such as is required by the true spirit and meaning of the contract and the intention of the parties as expressed therein. A mere literally accurate performance may wholly fail to satisfy the true purpose of the contract; and such a performance is not enough, if the true purpose of the contract can be gathered from it, according to the established rules of construction.

Thus, a contract for the conveyance of real estate is satisfied only by a valid conveyance with good title. *Smith v. Haynes*, 9 Greenl. (Me.) 128; *Brown v. Gammon*, 14 Me. 276; *Lawrence v. Dole*, 11 Vt. 549; *Pugh v. Chesseldine*, 11 Ohio, 109. But, if the contract expresses and defines the exact method of conveyance, and that method is accurately followed, it is a sufficient performance, although no good title passes. *Hill v. Hobart*, 16 Me. 164. See *Tinney v. Ashley*, 15 Pick. 546. But if the expression is "a good and sufficient deed," the deed must not only be good and sufficient of itself, but it must in fact convey a good title to the land, because otherwise it would not be sufficient for the purpose of the contract. *Tremain v. Liming*, Wright, 644; *Fletcher v. Button*, 4 N. Y. (4 Comst.) 396; *Stow v. Stevens*, 7 Vt. 27; *Stone v. Fowle*, 22 Pick. 166. Whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely upon himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time. *Ford v. Cotesworth*, 9 B. & S. 559; *Fitzgerald v. Hayward*, 50 Mo. 516. In the absence of a stipulation as to the time when an act is contracted to be done, the law allows a reasonable time for its performance. *Hart v. Bullion*, 48 Tex. 279. What is a reasonable time depends upon the nature and character of the thing to be done, the circumstances of the case and the difficulties attending its accomplishment. *Id.* And when the act to be done is one in which both parties to the contract are to concur, and both bind themselves to the performance of it, the law implies that each contracts that he shall use reasonable diligence in performing his part. *Ford v. Cotesworth*, 9 B. & S. 559. A party to a contract may be held to strict performance as to time, and put in default, for non-performance; and whether equity would relieve, would depend on circumstances. But to do this the party seeking to put the other in default must not only be ready and willing to perform, but he must tender performance at the time, and demand performance from the other. *Hubbell v. Von Schoening*, 49 N. Y. (4 Sick.) 326. A contract to pay for materials, to be furnished for the erection of a building, in monthly installments, upon the architect's estimates, is not broken by a failure to pay at the end of a month and before the architect has made his estimate. *Thurber v. Ryan*, 12 Kans. 453.

When a contract is divisible and capable of a separate physical performance, a delivery and acceptance of a part payment is sufficient, but if not divisible the whole contract must be performed at one time. *Talmage v. White*, 35 N. Y. Supr. Ct. (3 J. & Sp.) 219.

An offer, by one party, to perform, and a refusal, by the other

party, to accept services stipulated in the contract, are not equivalent to performance. *Wood v. Morgan*, 6 Bush (Ky.), 507.

Where parties contract to pay in a fluctuating medium, whether it be legal tender currency or not, they contract in view of and are each bound without regard to the fluctuation. *Leach v. Smith*, 25 Ark. 246. And a party contracting for work of a particular style, pattern, and finish is not bound to accept any thing different from what he has contracted for. *Neville v. Frost*, 2 E. D. Smith (N. Y.), 62.

A contract to build a mill fifty feet by one hundred and fifty is not, as a proposition of law, substantially complied with by building one that is seventy-eight feet by one hundred; though the purpose of the contract was to give the vendor security for the purchase-money of the lot, and though the mill built costs more, and is better adapted to the purposes for which it was intended than the one agreed to be built. *Swain v. Seamens*, 9 Wall. 254.

Where a contract for the building of a church provides that the work shall be done in a good and workmanlike manner, to the satisfaction of the architects furnishing the plans and specifications, to be certified under their hands, the church committee are under no obligation to accept the building without such certificate; but this is a privilege which they may waive. *Clark v. Pope*, 70 Ill. 128.

When it is provided in a building contract that the decision of an architect shall be final on all questions of difference arising under the contract, his decision that the work is completed in conformity with the terms of the contract is conclusive until impeached for fraud. *Downey v. O'Donnell*, 86 Ill. 49; *Wyckoff v. Meyers*, 44 N. Y. (5 Hand) 143. But where, by the terms of a contract for the repair of a building, it is stipulated that the materials shall be of the best quality and the work performed in the best manner, subject to an acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications, and to be paid for when done completely and accepted, the acceptance by the architect of a different class of work or of inferior materials will not bind the owner and does not relieve the contractor from the agreement to perform according to the plans and specifications. *Glacius v. Black*, 50 N. Y. (5 Sick.) 145; 10 Am. Rep. 449. Where a building contract makes an architect's certificate a condition precedent to payment, if the architect unreasonably and in bad faith refuses the certificate, the builder may recover upon other proof of performance. *Thomas v. Fleury*, 26 N. Y. (12 Smith) 26.

Where, by the terms of a contract, the claimants are bound and entitled to transport all the goods which may be purchased by the

Indian bureau for the public service, and transported over a certain railroad, under designated contract with that road, it is not a breach of the bureau to buy goods deliverable by the vendors at those agencies. *Piper v. United States*, 12 Ct. of Cl. 219.

It is not a sufficient performance of a contract to publish an advertisement for one year in the Sunday edition of a newspaper, upon the discontinuance of that edition, to continue the publication in the Saturday edition of the same paper; especially if the advertiser upon the discontinuance of the Sunday edition paid for the advertisement up to that time and ordered it stopped. *Sheffield v. Balmer*, 1 Mo. App. 176.

An agreement to enter into a contract is fulfilled, when the contract, pursuant to the terms of the agreement, has been entered into and accepted by the parties, and the agreement being *functus officio*, can not be made the basis of an action. *Chesbrough v. New York & Erie Railroad Company*, 26 Barb. (N. Y.) 9.

It is an ancient rule, that in cases where an election is given of two several things, always he that is the first agent, and who ought to do the first act, shall have the election. Co. Litt. 145 *a*. And see *Norton v. Webb*, 36 Me. 270. Generally the right of election is with the promisor, but this rule may give the election to the promisee, if something must first be done by him to create the alternative. *Chippendale v. Thurston*, 4 C. & P. 98. An agreement may be altogether optional with one party, and yet binding on the other. *Disborough v. Neilson*, 3 Johns. Cas. 81. Vol. 1, pp. 102, 103.

An agreement to deliver specific articles which are to be worth a specified amount, is legally fulfilled by the payment of the money in lieu of the articles. *Sims v. Cox*, 40 Ga. 76; 2 Am. Rep. 560.

§ 4. **Accepting performance.** A party need not accept a contract expressly or by his signature, if he does so by availing himself of its stipulations. *Smith v. Morse*, 20 La. Ann. 220. And if a party contracting for work of a particular style, pattern and finish, accept any thing different, he is bound for the contract-price, or, if his acceptance is so qualified, for the value. *Neville v. Frost*, 2 E. D. Smith (N. Y.), 62. If accepted and kept, the contract is consummated as though originally agreed to be so fulfilled. *Ely v. O'Leary*, 2 E. D. Smith (N. Y.), 355; *Francois v. Ocks*, id. 417. But the receiving of articles for a specified purpose and putting them to use, will not estop a party from claiming damage, if they shall prove defective. *Strawn v. Cogswell*, 28 Ill. 457. At law, time is of the essence of the contract, and performance is required at the day, or the consequence of default may follow. *Cromwell v. Wilkinson*, 18 Ind. 365. But where a party to a con-

tract for the construction of a certain article, to be delivered on or before a specified time, consents to receive it after that time, the acceptance is binding upon him. *Moore v. Detroit, etc., Works*, 14 Mich. 266; *Holmes v. Wilhite*, 3 Neb. 147.

Where work done under a contract has been accepted, the contractor is entitled to the contract-price, less the cost of completing his unfinished contract. *Howard v. City of Oshkosh*, 37 Wis. 242. And where certain bookbinding, commenced under contract with the State, was not completed until after the contract had expired, but the whole work was received by the State without objection, it was held that the State was liable for the price of the whole work. *State v. Auditor*, 61 Mo. 319.

§ 5. **Dispensing with, or waiver of performance.** A question of waiver is one of intention, and usually depends on acts or declarations which furnish only evidence and grounds of inference, and therefore is a question for the jury. The cases are very rare where the court, as a matter of construction, can determine whether the acts or declarations of a party constitute a waiver. *Fitch v. Woodruff, etc., Iron Works*, 29 Conn. 82; *Hansen v. Kirtley*, 11 Iowa (3 With.), 565; *Palmer v. Sawyer*, 114 Mass. 1. To constitute a waiver of a claim for a breach of warranty or contract, the acts or circumstances relied on to constitute a waiver must have been performed or have transpired after the party against whom the waiver is urged knew or should have known the facts constituting the breach of a warranty or contract. *Dodge v. Minnesota, etc., Roofing Co.*, 14 Minn. 49. Knowingly acquiescing in a deviation from a contract is a waiver of its strict performance. *Pike v. Nash*, 3 Abb. (N. Y.) App. Dec. 610. And see *ante*, p. 354, chapter on *Non-Performance*; *Garrison v. Dingman*, 56 Ill. 150; *Waters v. Harvey*, 3 Houst. (Del.) 441. If a party to a contract accepts and uses the subject-matter thereof in ignorance of a deficiency of performance, he will not be held to have waived his right to insist on the defect. *Veazie v. Bangor*, 51 Me. 509. And mere silence on the part of a party to a contract, whose obligation depends upon the performance of a condition precedent, by the other party, does not amount to a waiver of the condition, unless where such silence is inconsistent with any other explanation. *Burlington, etc., R. R. Co. v. Boestler*, 15 Iowa (7 With.), 555. But acquiescence in acts inconsistent with a clause of forfeiture, will dispense with a right to claim it. *Lauman v. Young*, 31 Penn. St. 306; *Swank v. Nichols' Adm'rs*, 24 Ind. 199; *Jordan v. Rhodes*, 24. Ga. 478.

Any or all of the several provisions of a written contract may, before breach, be waived by parol. *American Corrugated Iron Co. v.*

Eisner, 39 N. Y. Supr. Ct. (7 J. & Sp.) 200; *Billingsley v. Stratton*, 11 Ind. 396. And one party to a contract by waiving the benefit of a condition therein, thereby excuses the other party from showing a compliance therewith. *Attie v. Pelun*, 5 Clarke (Iowa), 336; *Stover v. Flack*, 30 N. Y. (3 Tiff.) 64. And if before the time of performing a contract arrives the promisor expressly renounces the contract, the promisee may treat this as a breach of the contract, and at once maintain an action in respect thereof. *Crabtree v. Messersmith*, 19 Iowa, 179. See *Abels v. Glover*, 15 La. Ann. 247. The refusal of an employer to permit his contractor to finish the work waives the performance. *Park v. Kitchen*, 1 Mo. App. 357; *Wheatly v. Covington*, 11 Bush (Ky.), 18. And see *ante*, p. 354, chapter on *Non-Performance*. And when it is shown that the plaintiff, in an action on a contract, did any thing to prevent the defendant from fulfilling it according to its terms, such interference on his part will excuse the defendant, so far as the time of performance was postponed by such act. *Ketchum v. Zeilsdorff*, 26 Wis. 514. A temporary waiver continues until clearly recalled by a distinct demand of strict performance. *Boutwell v. O'Keefe*, 32 Barb. (N. Y.) 434.

Payment for work done is not, of itself, and without regard to the circumstances under which it was made, conclusive evidence of a waiver of claims for defects in the work. *Moulton v. McOwen*, 103 Mass. 587. So where the building of a house is to be paid for in several installments, on the production of the architect's certificates, payment on some of the installments, without such production, does not operate as a waiver of the architect's final certificate upon the completion of the work. *Barton v. Hermann*, 11 Abb. (N. Y.) Pr. (N. S.) 378. But where a party refuses to perform a contract, because it is unprofitable, and the other party offers to pay him more if he will go on with the work, and he, in consideration thereof, then completes it, the new agreement is binding, and may waive rights of action growing out of the former. *Coyner v. Lynde*, 10 Ind. 282.

A defendant who would avail himself of a waiver as a defense must show that he has complied with its conditions. *Hill v. Smith*, 32 Vt. (3 Shaw) 433.

§ 6. **Partial performance.** Part performance and readiness to perform in full do not give a party the same rights as full performance. *United States v. Clarke*, 1 Hemp. 315. And it is not a rule of law that, when one party to a contract is prevented from performance by the act of the other party, such party can be fairly held to compensate in damages, under all circumstances, to the extent of the price agreed to be paid on full performance. The true rule seems to

be, that, when the contract has been partly performed, the just claim of the party employed to do the labor or service are satisfied when he is recompensed for the part performed and indemnified for his loss in respect to the part unexecuted. *Friedlander v. Pugh*, 43 Miss. 111; 5 Am. Rep. 478; *Bietry v. New Orleans*, 22 La. Ann. 149; *Bush v. Jones*, 2 Tenn. Ch. 190; *Wolf v. Gerr*, 43 Iowa, 339; *Lee's Case*, 4 Ct. of Cl. 156; *Phillip v. Gallant*, 62 N. Y. (17 Sick.) 256, 264. The maxim in chancery that he who seeks equity must do equity, when applied to a case of partial non-performance of an agreement, includes the rule at law which, in actions for damages upon contracts, discriminates between a whole or only a partial failure of performance; the breach being a bar when it goes to the whole, but no bar to a partial failure. In which case the party injured is entitled by a cross action to compensation. *Oxford v. Provand*, L. R., 2 P. C. 135; 5 Moore's P. C. C. (N. S.) 150.

Where time is made the essence of the contract, and it is stipulated that the party who fails in performance shall lose his interest therein, such failure does not render the contract null and void. A subsequent part performance by the party not delinquent is a waiver of the breach. *Audubon County v. American Emigrant Co.*, 40 Iowa, 460.

A partial performance may be a defense, *pro tanto*, or it may sustain an action *pro tanto*; but this can only be in cases where the duty to be done consists of parts which are distinct and severable in their own nature, and are not bound together by expressions giving entirety to the contract. It is not enough that the duty to be done is in itself severable, if the contract contemplates it is only as a whole. See Pars. on Cont. 171 and cases cited.

Where a contract is entire and one party is willing to complete the performance and is not in default, no promise can be implied on his part to compensate the other party for a part performance, although the contract itself is void by the statute of frauds. *Galvin v. Prentice*, 45 N. Y. (6 Hand) 162; 6 Am. Rep. 58.

§ 7. **Tender of performance.** See *ante*, Vol. 1, p. 694; Vol. 3, pp. 303, 517; Vol. 4, pp. 145, 544; Vol. 5, pp. 582, 584, 805, 806.

Where the two parties to a contract are required by it to do concurrent acts, those on one side being the consideration for those on the other, it is not necessary that one of the parties, in order to secure a right of action against the other, should make a formal and express tender of performance on his part, if he show that he made no default himself, that he was ready and willing to perform his part of the contract, that this was well understood by the other party, and that the

latter, notwithstanding, refused to perform on his side. *Cobb v. Hall*, 33 Vt. (4 Shaw) 233; *Skinner v. Tinker*, 34 Barb. (N. Y.) 333. But where the provisions of a contract are mutual and dependent, and to be simultaneously performed, and both parties are equally in default as to time, neither can hold himself discharged from the obligation of a complete performance until he has tendered performance on his part and demanded it on the other. *Crabtree v. Levings*, 53 Ill. 526.

In the performance of a contract there is a distinction between a readiness and a willingness to pay the contract-price, which latter may be tested by the production of money or an offer to pay; but neither a tender nor an offer to pay can be required as the legal measure of proof of readiness, where the article contracted for is by the terms of the contract deliverable in lots, uncertain as to time and quantity, and where quality and measurement are prerequisite to payment. In such case readiness to pay depends upon the intention of the party as manifested by his conduct and declarations. *North American Oil Co. v. Forsyth*, 48 Penn. St. 291. Notice by the purchaser that he is ready to take and pay for the goods bargained for at the place of delivery appointed is a sufficient tender of performance. *Sears v. Conover*, 34 Barb. (N. Y.) 330.

Upon a contract for the delivery of certain articles, a tender of such articles is necessary to put the vendee in default, and they are at the risk of the vendor until so tendered. *Blackman v. Hoey*, 18 La. Ann. 23. But a tender does not operate as an absolute discharge from liability on the contract. A tender of specific articles, or goods, only exonerates the party from responsibility for their safe-keeping. As long as he continues in possession of the goods, he will be bound to deliver them on demand. *Fisk v. Holden*, 17 Texas, 408. When the debtor upon a contract expressed to be payable in a particular kind of property or currency, makes a tender of the specified paper, he makes it the property of the creditor. If the creditor refuses to accept, and the debtor retains possession, the latter becomes a bailee of the former. He cannot use the property to its depreciation, except to discharge necessary expenses for its protection. He cannot collect and use for himself, interest accruing upon it if a currency or money security. *Fannin v. Thomason*, 50 Ga. 614.

§ 8. **What is a discharge from.** Where a contract is entire, the first breach is a breach of the whole, and discharges the other party from the performance of any conditions on his part and gives him a complete right of action. *Haskell v. McHenry*, 4 Cal. 411; *Cullum v. Wagstaff*, 48 Penn. St. 300. And to enable a party to a contract to sue for a breach, before the arrival of the time designated for per-

formance, on the ground that the defendant has refused to perform, it must appear, unless the refusal has been acted on, that such refusal was positive, and was persisted in down to the time set for performance, or that defendant has rendered himself unable to perform the contract on his part. *Gray v. Green*, 9 Hun (N. Y.), 334.

A debt which is due can be discharged only by a release under seal, or by an accord and satisfaction. *Young v. Power*, 41 Miss. 197.

If parties, by clear and explicit terms, provide that time shall be of the essence of their contract, nothing but the act of God will excuse a failure to perform. *Miller v. Phillips*, 31 Penn. St. 218.

A contract to employ one as clerk and agent is dissolved by the death of either party; and when the principal dies, no action lies against his administrator for refusing to continue the employment of the agent. *Yerrington v. Greene*, 7 R. I. 589.

The promise to do certain things may be accepted in discharge of an agreement, and then the failure to perform does not affect the discharge. *Acker v. Bender*, 33 Ala. 230.

A contractor sought to recover the price of certain iron work, manufactured for a building which he was to put up, and he paid for upon the estimate of an architect; the building having been destroyed by fire before the same could be put up, and the plaintiff being in no default, it was held that the case contemplated for the architect's certificate never arose, and that a recovery could be had without it, according to the contract-price for the iron work manufactured. *Rawson v. Clark*, 70 Ill. 656. See *Niblo v. Binsse*, 1 Keyes, 476; 3 Abb. Ct. App. 375. But one who has agreed to build a house upon the land of another, and has substantially performed his contract, but has not completely finished the house nor delivered it, when it is destroyed by fire, is liable to an action for money advanced upon the contract and damages for its non-performance. *Tompkins v. Dudley*, 25 N. Y. (11 Smith) 272.

§ 9. Excusing non-performance. One of the parties to a contract cannot complain of a failure to perform on the part of the other, if his own *laches* or refusal to perform has contributed to defeat the object of the contract. *Smith v. Cedar Rapids, etc., R. R. Co.*, 43 Iowa, 239; *Taylor v. Renn*, 79 Ill. 181; *Coulter v. Board of Education*, 63 N. Y. (18 Sick.) 365; *Buffkin v. Baird*, 73 No. Car. 283; *European, etc., Co. v. Royal Mail Co.*, 10 C. B. (N. S.) 860. But a contractor is not excused for non-performance on the ground of interference by a third person not a party to the contract. *Bowery Nat. Bank v. Mayor, etc.*, 63 N. Y. (18 Sick.) 336.

If one bound to perform a future act, before the time for doing it,

declares his intention not to do it, this, of itself, is no breach of his contract; but if this declaration be not withdrawn when the time arrives for the act to be done, this constitutes a sufficient excuse for the default of the other party. *McPherson v. Walker*, 40 Ill. 371. If one of the parties to a contract attempts to vary or change its terms, the other is thereby released; and an unintentional part performance, which is withdrawn as soon as discovered, will not imply an assent to the change. *Turner v. Baker*, 30 Ark. 188.

In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. *Taylor v. Caldwell*, 3 B. & S. 826; *Walker v. Tucker*, 70 Ill. 527. And on a contract for personal services, sickness is sufficient to excuse delay, or even non-performance. *Green v. Gilbert*, 21 Wis. 395. But where certain parties agreed to furnish one with lumber as fast as he should need it to build a certain house, and they were dependent for their lumber, on certain mills, a fact which the one to whom the lumber was to be furnished knew, they will not be excused from their contract on account of the giving out of the mills. *Eddy v. Clement*, 38 Vt. 486. And the temporary incapacity from gross intoxication of a judge does not excuse a plaintiff from performance of an agreement to bring a case to trial before that judge. *Cobb v. Harmon*, 23 N. Y. (9 Smith) 148. And see *ante*, p. 354, chapter on *Non-Performance of Condition Precedent*, where the subject is more fully discussed.

§ 10. **Conditions to demanding.** Where a subscription is made upon several distinct and separate conditions, these conditions must all be performed before the subscription can be collected. *Porter v. Raymond*, 53 N. H. 519.

§ 11. **Agreements to arbitrate.** Where the parties to a building contract agree upon an architect, and stipulate and agree to rely upon his judgment, skill, and decision as to the character, amount and value of the work to be done, they must abide by his judgment and decision, or impeach it upon the ground of fraud, mistake, undue influence or some other good cause. *Board of Education v. Shaw*, 15 Kans. 33; *Mercer v. Harris*, 4 Neb. 77. See *ante*, p. 425, § 3.

Where parties enter into a contract whereby one of them is to fill up a certain place with gravel, the amount of filling in to be measured by the city engineer, and his measurement to be final and conclusive, the measurement of the work, by his assistant, revised by himself, is such a performance of his duties as the contract intends. *Palmer v. Clark*, 106 Mass. 373.

§ 12. **Performance impossible.** Full performance is excused where it is rendered impossible by the act of God, or of the law, or of the other party to the contract. *Jennings v. Lyons*, 39 Wis. 553; 20 Am. Rep. 27; *Hargrave v. Conroy*, 14 N. J. Eq. 281; *Bunn v. Prather*, 21 Ill. 217; *School District No. 1 v. Dauchey*, 25 Conn. 530. But the non-performance of a contract is not excused by the act of God, where it may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible. *Williams v. Vanderbilt*, 28 N. Y. (1 Tiff.) 217. And when an obligor, from inevitable accident or irresistible force, cannot perform one of two things, either of which at the time of his engagement he had the option to do, he is not relieved from the obligation to perform the other. *Jacquinet v. Boutron*, 19 La. Ann. 30. But a party in default may be relieved in equity, upon showing sufficient excuse for non-performance in consequence of civil war until after the time for performance had elapsed. *Atkins v. Rison*, 25 Ark. 138. But when the performance of a contract became impossible, and the cause of this impossibility was a contingency which a man of reasonable prudence should have seen and guarded against, the non-performance will not be excused. *Bryan v. Spurgin*, 5 Sneed (Tenn.), 681. And where one undertakes to do certain work, for which his employer through a third person furnishes the materials, upon the quality of which the workman is to decide, he cannot excuse himself for non-performance on the ground of the unsuitableness of the materials furnished, without showing that he gave the employer seasonable notice of the defect. *Moore v. Lea*, 32 Ala. 375.

If at the place where a special contract for labor is to be performed, there prevail during the continuance of the contract a fatal and contagious disease, so that a man of ordinary care and prudence would not deem it safe to remain there, it is sufficient cause for the non-fulfillment of the contract, and the plaintiff can recover on a *quantum meruit* for what service he actually performed. *Lakeman v. Pollard*, 43 Me. 463.

CHAPTER LIV.

PRIVILEGED COMMUNICATION.

ARTICLE I.

GENERAL RULES.

Section 1. Definition and nature. It is a good defense in an action for libel that the alleged libel was in the nature of a privileged communication, and although perhaps not true, was believed to be so by the publishers who acted without malicious intent. *Holt v. Parsons*, 23 Texas, 9. The meaning in law of a privileged communication is, a communication made on such an occasion as rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the *onus* of proving malice in fact, but not of proving it by extrinsic evidence only; he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it. *Wright v. Woodgate*, 2 C. M. & R. 573; 1 Tyr. & G. 12; 1 Gale, 329; *Saunders v. Baxter*, 6 Heisk. (Tenn.) 369; *ante*, Vol. 4, p. 304; *Holt v. Parsons*, 23 Texas, 9. Privileged communications comprehend all statements made *bona fide* in performance of a duty, or with a fair and reasonable purpose of protecting the interests of the person making them, and the *onus* of proving malice lies on the plaintiff. *Somerville v. Hawkins*, 10 C. B. 583; 15 Jur. 450. And see *ante*, Vol. 4, p. 305. When, in an action for libel, the defendant insists that the publication is privileged, it is for the judge to rule whether the occasion creates the privilege. If the occasion creates such privilege, but there is evidence of express malice, either from extrinsic circumstances or from the language of the libel itself, the question of express malice should be left to the jury. *Cooke v. Wildes*, 5 El. & Bl. 329; 3 C. L. R. 1090; 1 Jur. (N. S.) 610. The principle on which privileged communications rest, which, of themselves, would otherwise be libelous, imports confidence and secrecy between individuals, and is inconsistent with the idea of a communication made by a society

or congregation of persons, or by a private company or a corporate body. *Beardsley v. Tappan*, 5 Blatchf. (C. C.) 497.

Privileged communications are of four kinds, to wit: 1. Where the publisher of the alleged slander acted in good faith in the discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests; 2. Any thing said or written by a master concerning the character of a servant who has been in his employment; 3. Words used in the course of a legal or judicial proceeding; and 4. Publications duly made in the ordinary mode of parliamentary proceedings.

White v. Nicholls, 3 How. (U. S.) 266. The law recognizes two classes of cases in which the occasion either supplies an absolute defense, or a defense subject to the condition that the party acted *bona fide* without malice. The distinction turns entirely on the question of malice. The communications last mentioned lose their privilege on proof of express malice. The former depend in no respect for their protection upon the *bona fides* of the defendant. The occasion is an absolute privilege, and the only questions are whether the occasion existed, and whether the matter complained of was pertinent to the occasion. Heard on Libel and S., § 89. And see *ante*, Vol. 4, p. 305, and cases there cited.

§ 2. **What are privileged.** The cases in which communications are privileged are very fully stated in Art. 3 of the chapter on *Libel*, *ante*, Vol. 4, p. 304 *et seq.*, and in Art. 3 of the chapter on *Slander*, *ante*, Vol. 5, p. 754 *et seq.* From an examination of those volumes it will be seen that as to communications which are absolutely privileged, it may be stated as the result of the authorities that no person is liable, either civilly or criminally, in respect of any thing published by him as a member of a legislative body, in the course of his legislative duty, nor in respect of any thing published by him in the course of his duty in any judicial proceeding. This privilege extends not only to parties, counsel, witnesses, jurors, and judges in a judicial proceeding, but also to proceedings in legislative bodies, and to all who in the discharge of public duty or the honest pursuit of private right, are compelled to take part in the administration of justice or in legislation. A fair report of any judicial proceeding or inquiry is also privileged. And see Heard on Libel and S., §§ 90, 103, 110.

As to communications which are conditionally privileged, there is involved a question of good faith or motive which can only be settled by the jury. The court cannot rule that such a communication is privileged, without assuming the conditions on which it is held to be privileged, namely: that it was made in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of its

truth. And see *Palmer v. Concord*, 48 N. H. 217. And where the defense is that the communication was privileged, it must appear that the circumstances were such as to call for it and forbid any inference of malice. *Elam v. Badger*, 23 Ill. 498.

No action lies against an attorney-at-law, for words spoken before a jury, without proof of actual malice. *Lester v. Thurmond*, 51 Ga. 118; *Mackay v. Ford*, 5 Hurl. & Nor. 792; *Hodgson v. Scarlett*, 1 B. & A. 232. But the subsequent publication of such slanderous matter is not justifiable unless it is shown that it was published for the purpose of giving the public information which it was fit and proper for them to receive, and that it was warranted by the evidence. *Flint v. Pike*, 5 D. & R. 528; 4 B. & C. 473.

An action will not lie against a witness who in the due course of a judicial proceeding has uttered false and defamatory statements concerning the plaintiff, even although he did so maliciously, and without reasonable and probable cause, and the plaintiff has suffered damage in consequence. *Revis v. Smith*, 36 Eng. Law & Eq. 268; 18 C. B. 126. Or although the statement was irrelevant, and was expunged from the affidavit as being prolix, impertinent and scandalous, by an order of the court. *Kennedy v. Hilliard*, 10 Ir. C. L. R. 195. And the party scandalized was not a party to the cause. *Henderson v. Broomhead*, 4 H. & N. 569; 28 L. J. Exch. 360. And the testimony of a witness, given on a trial, in which he acknowledged the uttering of several words alleged to be slanderous, cannot be proved as an admission in a subsequent action for slander brought against him. *Osborn v. Forshee*, 22 Mich. 209. See Vol. 1, p. 150; Vol. 2, p. 117.

At a town meeting having under consideration an application from the assessors of the town for re-imbursement for expenses incurred in defending a suit alleged to have been brought against them for making false answers under oath, a statement of a voter and a tax payer that they had therein perjured themselves is privileged, if made without malice and believing it to be true. *Smith v. Higgins*, 82 Mass. (16 Gray) 251.

Proceedings upon a petition to the governor for the removal of a sheriff from office are *quasi* judicial, and statements made in such petition, if pertinent, are absolutely privileged, and no action for libel founded upon them can be maintained. *Larkin v. Noonan*, 19 Wis. 82.

No action will lie against a witness for what he says or writes when giving public evidence before a court of justice. The rule is founded on principles of public policy. And the same principle applies where a military man is bound to appear and give evidence before a military

court of inquiry. *Dawkins v. Rokeby*, L. R., 7 H. L. 744; 14 Eng. 127, affirming L. R., 8 Q. B. 255; 5 Eng. R. 212.

The rule, that the publication of a fair and correct report of proceedings taking place in a public court of justice is privileged, extends to proceedings taking place publicly before a magistrate on the preliminary investigation of a criminal charge, terminating in the discharge by the magistrate of the party charged. *Lewis v. Levy*, 1 Ellis, B. & E. 537. And the conduct of persons at a public meeting held for the purpose of promoting the election of a candidate for a seat in parliament may be made the subject of fair and *bona fide* discussion, by a writer in a public newspaper, and unfavorable comments made upon such conduct in the course of such discussion are privileged. *Davis v. Duncan*, L. R., 9 C. P. 396; 22 W. R. 575; 43 L. J. C. P. 185; 30 L. T. (N. S.) 464.

§ 3. **What are not such.** See *ante*, Vol. 4, pp. 309-311; *ante*, Vol. 5, pp. 756-758.

A communication from one member of a church to another as to the rumored criminal conduct of a third is not privileged. *York v. Johnson*, 116 Mass. 482. And see *O'Donaghue v. McGovern*, 23 Wend. 26.

A statement made upon the authority of a newspaper and not purporting to be a report of the proceedings of a court is not privileged, and the responsibility therefor cannot be evaded by offer of proof that the libel was in fact matter of evidence. *Storey v. Wallace*, 60 Ill. 51. And a newspaper has no right to publish the contents of an *ex parte* affidavit made to obtain the plaintiff's arrest on a criminal process, unless the charge made by the affidavit be true. *Cincinnati, etc., Co. v. Timberlake*, 10 Ohio (N. S.), 548; *Stanley v. Webb*, 4 Sandf. (N. Y.) 21. The publication in a newspaper, of an attack upon a person not a candidate for the votes of the people, but for those of an appointing power, is not privileged. *Hunt v. Bennett*, 19 N. Y. (5 Smith) 173. And the publication of a report of judicial proceedings is not privileged if it contain intrinsic evidence that it was not published with good motives or for justifiable ends. *Saunders v. Baxter*, 6 Heisk. (Tenn.) 369. A slanderous statement made by a physician is not a privileged communication, unless it be made in good faith to one who is reasonably entitled to receive the information; and when made to others, and the statement is false, he is not relieved from liability to the injured party, merely because, on an examination of the patient, he believed it to be true. Such belief, however, may be considered in mitigation of damages. *Alpin v. Morton*, 21 Ohio St. 536; *Perkins v. Mitchell*, 31 Barb. 461.

The transmission unnecessarily by a post-office telegram of libelous matter which would have been privileged if sent in a sealed letter, avoids the privilege. *Williamson v. Freer*, L. R., 9 C. P. 393; 10 Eng. R. 225; 43 L. J. C. P. 161; 22 W. R. 878; 30 L. T. (N. S.) 332.

Evidence that a charge of stealing was not made against the plaintiff, until after she left the defendant's service, and that he promised to say nothing about it if she would resume her employment, and that on a subsequent occasion he said if she would acknowledge the theft he would give her a character, is evidence to warrant a jury in concluding that, in repeating this charge where asked by a third party for a character of the plaintiff, he was not acting *bona fide* in the performance of a duty. *Jackson v. Hopperton*, 16 C. B. (N. S.) 829.

§ 4. When interest requires it. See *ante*, Vol. 4, pp. 304-311; Vol. 5, pp. 754-758.

Words used by a person in the conduct of his own affairs, where his interest is concerned, and in reference to his interest, are privileged, and an action of slander cannot be maintained therefor unless the evidence shows that they were not spoken in good faith, with a belief in their truth, and that the defendant was chargeable with express malice. *Clapp v. Devlin*, 35 N. Y. Supr. (3 J. & Sp.) 170; *McDougall v. Claridge*, 1 Campb. 266. A written communication between private persons concerning their own affairs is *prima facie* privileged. And though all that is said is under mistake, yet the words are not for that reason alone actionable. *Howard v. Thompson*, 21 Wend. 319; *P. W. & B. R. R. v. Quigley*, 21 How. (U. S.) 202; *Klinck v. Colby*, 46 N. Y. (1 Sick.) 427. And see *Harrison v. Bush*, 32 Eng. Law & Eq. 173; 5 El. & Bl. 344; *Whiteley v. Adams*, 15 C. B. (N. S.) 392; *Shipley v. Todhunter*, 7 C. & P. 680. When, however, the interest is confined solely to the party receiving the communication, the authorities are not so decided. *Lewis v. Chapman*, 16 N. Y. (2 Smith) 369. But it is well settled in New York, at least, that a communication is privileged when made in good faith, in answer to one having an interest in the information sought; and it is also privileged if volunteered when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such relation to him as to make it a reasonable duty, or at least proper that he should give the information. *Sunderlin v. Bradstreet*, 46 N. Y. (1 Sick.) 188; 7 Am. Rep. 322; *Washburn v. Cooke*, 3 Denio, 110; *Lewis v. Chapman*, 16 N. Y. (2 Smith) 369. So, where one having an interest in knowing the credit and standing of another applies to a mercantile agency to obtain the desired information, the answer to such application will be a privileged communication.

Ormsby v. Douglass, 37 N. Y. (10 Tiff.) 477. And if such information is recorded in a book to which only the parties therein interested have access, the publication so made will be privileged; but otherwise, if other parties had access to the book, although such parties stood in the relation of clerks. *Beardsley v. Tappen*, 5 Blatchf. C. C. 497.

§ 5. **Duty to public or individuals.** The fair and honest discussion of, or comments upon, a matter of public interest is, in point of law, privileged, and is not the subject of an action unless the plaintiff can establish malice. *Henwood v. Harrison*, L. R., 7 C. P. 606; 3 Eng. R. 398; 41 L. J. C. P. 206; 26 L. T. (N. S.) 938. But a defamatory publication in a public journal cannot be said to be privileged simply because it relates to a subject of public interest, and was published in good faith, without malice and from laudable motives. No adjudicated case has ever gone so far. But while such publications cannot be deemed privileged, so as to require proof of express malice, the publisher, in order to rebut the presumption of malice, should be allowed the fullest opportunity to show the circumstances under which the publication was made, the sources of his information, and the motives which induced the publication. The public interest and a due regard to freedom demands that its conductors should not be mulcted in punitive damages on subjects of public interest, made from laudable motives, after due inquiry as to the truth of the facts stated, and in the honest belief that they were true. On the other hand, if the rule were further relaxed, so that such publications in respect to private persons would be deemed privileged, thereby shifting the burden of proof from the defendant to the plaintiff, in respect to malice, there would be little security for private character. It is easier for the publisher to show the circumstances under which the publication was made, the sources of his information, and the motives for the publication, and thus to rebut the presumption of malice. But if the burden of proof were on the plaintiff, it would often, and perhaps generally, be very difficult, if not impossible, to prove express malice. The rule which allows to the publisher the fullest opportunity to rebut the presumption of malice secures to him all the protection which is consistent with a due regard to the safety of private character. *Wilson v. Fitch*, 41 Cal. 363. And see *ante*, Vol. 4, p. 304 *et seq.*; *Campbell v. Spottiswoode*, 3 B. & S. 769; 3 F. & F. 421; *Ryan v. Wood*, 4 id. 735; *Cox v. Feeny*, id. 13; *Hedley v. Barlow*, id. 224.

§ 6. **Defense of self or interest.** When a communication is fairly made by one person to another, in the discharge of some public or private duty, whether legal, moral or social, or in the conduct of his

own affairs in matters where his interests are concerned, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defense, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits. *Toogood v. Spring*, 1 C. M. & R. 194; *Somerville v. Hawkins*, 10 C. B. 583; *Moore v. Butler*, 48 N. H. 161; *Van Wyck v. Aspinwall*, 17 N. Y. (3 Smith) 190. And see *ante*, p. 440, § 4, and Vol. 4, pp. 304-311; Vol. 5, pp. 754-758; *Laughton v. Bishop of Lodor and Man*, L. R., 4 P. C. 495. But to create a privileged occasion there must be, not only an interest in making a communication, but also a legitimate interest in the matter communicated. *Simmonds v. Dunne*, 5 Ir. L. C. L. 358. If the occasion is privileged and the objection is, that the publication goes too far, and contains matter exceeding the privilege, the question whether it does so or not is not a question for the court to decide on demurrer, but one for the consideration of the jury, on the plea of privilege. *O'Donaghue v. Hussey*, 5 Ir. R. C. L. 124; *Cooke v. Wildes*, 5 El. & Bl. 329; 1 Jur. (N. S.) 610; 24 L. J. Q. B. 367; 3 C. L. R. 1090. Words spoken by the defendant in an action of tort for slander, which relate to a subject-matter in which he is immediately interested, and are said for the purpose of protecting his own interest, and in the full belief that they are true, are privileged communications, though made in the presence of others than the parties immediately interested, and it is incumbent upon the plaintiff to show malice in fact in order to recover. *Brow v. Hathaway*, 13 Allen (Mass.), 239; *Ormsby v. Douglass*, 37 N. Y. (10 Tiff.) 477.

A person whose character and conduct have been attacked through the press is privileged in addressing his defense through the same channel, provided he does so *bona fide* for the purpose of vindicating himself, or of informing the public upon matters which they are concerned to know. *Laughton v. Bishop of Lodor and Man*, L. R., 4 P. C. 495; 9 Moore's P. C. C. (N. S.) 318; 21 W. R. 204; 28 L. T. (N. S.) 377; *O'Donaghue v. Hussey*, 5 Ir. R. C. L. 124.

§ 7. **Literary criticism.** Whatever is fairly written of a work and can be reasonably said of it, or of its author, as connected with it, is not actionable unless it appears that the party, under the pretext of criticising the work, takes an opportunity of attacking the character of its author. *MacLeod v. Wakeley*, 3 C. & P. 311.

It is not libelous to ridicule a literary composition or the author of it, in as far as he has embodied himself with his work, and if he is not

followed into domestic life for the purpose of slander he cannot maintain an action for any damage he may suffer in consequence of being thus ridiculed. *Carr v. Hood*, 1 Camp. 355 n. But this immunity does not extend beyond the discussion of the published writings on public or undoubted acts of the author, and does not extend to the gratuitous assertion of matters of fact for which there is no foundation. *Morrison v. Belcher*, 3 F. & F. 614. If a critic, in criticising a work, goes out of his way to attack the private character of the author, this is a libel. *Fraser v. Berkeley*, 7 C. & P. 621. But in an action for a libel upon the plaintiff, in his business of a bookseller, accusing him of being in the habit of publishing immoral and foolish books, the defendant, under the plea of not guilty, may adduce evidence to show that the supposed libel is a fair stricture upon the general run of the plaintiff's publications. *Tabart v. Tipper*, 1 Campb. 350. The publication of a critique upon a literary work, couched in terms of condemnation, however strong, and even though imputing profanity or indecency, will be excused, unless it appears that it is so unfair and reckless in its character that it may be presumed to have been published, not honestly, but maliciously. *Strauss v. Francis*, 4 F. & F. 939, 1107; 15 L. T. (N. S.) 674.

A fair, reasonable and temperate, though an erroneous criticism of works of art, not written for the purpose of hurting the artist in his profession, is not a libel. *Soune v. Knight*, M. & M. 74. So, it is not libelous to call a publicly exhibited painting a daub. *Thorison v. Shackell*, M. & M. 187. So, a tradesman's advertisement, placard, or handbill, is open to fair criticism and remark, as a book or as a work of art. *Paris v. Levy*, 9 C. B. (N. S.) 342; 30 L. J. C. P. 1; 9 W. R. 71; S. C., at *nisi prius*, 2 F. & F. 71.

Lord ELLENBOROUGH justly says: "Every man who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance Authors are liable to criticism, to exposure and even to ridicule, if their compositions are ridiculous, otherwise the first who writes a book upon any subject will maintain a monopoly of sentiment and of opinion respecting it, which would tend to the perpetuity of error The critic does a great service to the public who writes down any useless or vapid publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and their money upon trash." *Carr v. Hood*, 1 Campb. 355 n.

CHAPTER LV.

RECEIPT.

ARTICLE I.

GENERAL RULES.

Section 1. Definition and nature. A receipt is a written acknowledgment of having received money or a thing of value, without containing any affirmative obligation upon either party to it, a mere admission of a fact in writing. When it contains stipulations which amount to a contract, it must be governed by the law of contracts, and can be avoided only as contracts are avoided. *Krutz v. Craig*, 53 Ind. 561; *Stapleton v. King*, 33 Iowa, 28; *Knoblauch v. Kronchnabel*, 18 Minn. 300. An acknowledgment of having received the acceptance of a bill of exchange is a receipt for money. *Scholey v. Welsby*, Peake, 24. But a memorandum importing that one party had paid money, but containing no acknowledgment by the other that he had received it, is not a receipt. *Ree v. Harvey*, R. & R. C. C. 227. A document, not purporting on the face of it to be a receipt for the payment of money, may be shown to be a receipt by extrinsic evidence. *Reg. v. Overton*, Dears. C. C. 308; 18 Jur. 134; 23 L. J. M. C. 29.

A writing, dated of a certain date, and reciting that the party signing it received a certain sum of money in orders, taken at eighty cents on the dollar in full, is not a contract in the ordinary sense of the term, but simply a receipt. *Pauley v. Weisart*, 59 Ind. 241.

A receipt is executed by the person to whom the delivery or payment is made, and may be used as evidence against him, on the general principle which allows the admission or declaration of a party to be given in evidence against himself. As an instrument of evidence, the receipt of one person is, in general, inoperative against another, although often useful as a voucher in the private settlement of accounts, and the statutes of some States make receipts for small payments made by executors, etc., evidence of the payment on a settlement of their accounts. And receipts of public officers are sometimes admissible, *per se*. 2 Bouv. Law Dict. 416.

§ 2. Its operation and effect. The mere acknowledgment of payment made is not treated in law as binding or conclusive in any high degree. So far as a simple acknowledgment of payment or delivery is concerned, it is presumptive evidence only, and is in general open to explanation.

The effect to be given to a receipt for the consideration-money, so frequently inserted in a deed of real property, has been the subject of numerous and conflicting adjudications. The general principle settled by the weight of authority is that for the purpose of sustaining the conveyance as against the vendor and his privies the receipt is conclusive; they are estopped to deny that a consideration was paid sufficient to sustain the conveyance. *Greenvault v. Davis*, 4 Hill (N. Y.), 643; *Suydam v. Jones*, 10 Wend. 180. But in a subsequent action for the purchase-money or upon a collateral demand, *e. g.*, in an action to recover a debt which was in fact paid by the conveyance, or in an action for damages for breach of a covenant in a deed, and the like, the grantor may show that the consideration was not in fact paid, or that an additional consideration to that mentioned was agreed for. *McCrea v. Purmort*, 16 Wend. 460. And see *Jordan v. Cooper*, 3 Serg. & R. 564; *Hutchinson's Admr. v. Sinclair*, 7 Monr. 291; *Garrett v. Stuart*, 1 McCord, 514; *Steele v. Worthington*, 2 Ham. 182; *Harvey v. Alexander*, 1 Rand. 219.

Where a debtor pays a portion of his debt, which portion he admits to be due at the time he pays it, but claims that it is all that is due, and that it is the whole of the debt, and the creditor receives the same and signs a receipt in full therefor, but at the same time claims that it is only a portion of the debt, and that the other portion still remains due, the creditor is not estopped by his receipt from afterward suing the debtor and recovering the balance of the debt not yet paid. *Amer. Bridge Co. v. Murphy*, 13 Kans. 35.

In the absence of any proof to the contrary, a writing, "Received of S. \$100 commission on purchase of mill," duly signed, is a receipt in full. *Elting v. Sturtevant*, 41 Conn. 176.

A receipt signed "Hill & Sulser," is not on its face the obligation of a partnership, but imposes a joint and several liability on the persons who signed it; and, in an action on such receipt against Oliver P. Hill, or his administrator, the writing is competent evidence, without proof of his signature or of the existence of a partnership. *Hill v. Nichols*, 50 Ala. 336.

A receipt for a sum lacking a small amount of the face of the note, "in payment of the note which is lost," is only a payment *pro tanto*. *Witherington v. Phillips*, 70 No. Car. 444.

A receipt is often used as evidence of facts collateral to those stated in it. It proves the payment; and whatever inference may be legally drawn from the fact of the payment described will be supported by the receipt. Thus, receipts for rent for a given term have been held *prima facie* evidence of the payment of all rent previously accrued. *Decker v. Livingston*, 15 Johns. (N. Y.) 479.

§ 3. **Its validity.** A jury is warranted in finding a receipt to be valid, which contains certain altered words and figures, and is held by an executor and signed by his testator as a discharge of certain notes held by the testator against the executor, in the absence of any showing that the alterations were not made previously to the signing. *Thrasher v. Anderson*, 45 Ga. 539.

§ 4. **Its value as evidence.** The production of a receipt in full for the demand in suit is, presumptively, sufficient evidence to sustain the defense of payment, and casts on the plaintiff the burden of explaining or disproving it. To instruct a jury that payment is a defense, and the receipt tends to show payment is erroneous; as it leaves them to infer that the receipt standing alone does not fully establish a defense. *Guyette v. Bolton*, 43 Vt. 228. And although a receipt given for money paid is not conclusive between the parties, and may be contradicted or explained by evidence, yet when the evidence offered is contradictory, and that offered on one side is entitled to as much weight as the other, the receipt will stand. *Borden v. Hope*, 21 La. Ann. 581. But a receipt offered in evidence as tending to prove that the parties made the payment acknowledged as partners, was held, under the circumstances of a particular case, not admissible. *Ehrman v. Kramer*, 30 Ind. 26.

When a receipt acknowledged a certain sum in full of certain described promissory notes, and in full of all demands, the general words, though they do not enlarge the particular words as to what transpired at the time, yet they do import and may be used to prove that the party giving the receipt had, at the time, no other demands against him to whom the receipt was given. *Allen v. Woodson*, 50 Ga. 53.

A receipt expressed to be in satisfaction of "all claims and demands," if not competent to prove a sale or conveyance under the statute of frauds, is evidence of an accord and satisfaction; and when coupled with the payment of money, will bar an action in equity, based on prior claims or demands, for a recovery of an interest in the lands of the party paying the money and holding the receipt. *Grumley v. Webb*, 48 Mo. 562; S. C., 44 id. 444.

An administrator signed and delivered to B a receipt for a certain sum of money, reciting that it was in full payment of all sums due his

intestate, as per statement thereto attached. This statement showed the whole amount due the intestate's estate, subject to a credit of \$324, paid to intestate's widow by B, after intestate's death. This credit (after deducting a small sum for error), with the amount stated in the body of the receipt, made up the whole amount due intestate's estate. And it was held that this receipt, in connection with the other evidence in the cause, not being impeached for mistake, error or fraud, was evidence of a settlement of accounts between the parties, and was a ratification and acceptance of the payments claimed as credits in said receipt. *Ruby v. R. R. Co.*, 8 W. Va. 269.

§ 5. **Its conclusiveness.** A receipt is never conclusive when fraud or mistake is alleged against it; and even a formal release is void, when obtained by fraudulent representations. *Clark v. Deveau*, 1 So. Car. 172. And see *Russell v. Church*, 65 Penn. St. 9; *Skaike v. Jackson*, 5 D. & R. 290; 3 B. & C. 421; *Benson v. Bennett*, 1 Camp. 394, n.; *Farrar v. Hutchinson*, 1 P. & D. 437; 9 A. & E. 641; 2 W., W. & H. 106; *Dodd v. Mayson*, 39 Ga. 605. But a receipt in full is conclusive evidence, when given under a knowledge of all circumstances then depending between the parties. *Bristow v. Eastman*, 1 Esp. 173; Peake, 223. Thus a receipt in full, given by a brakeman who had been injured through the fault of the company employing him, and not shown to have been procured by false representations, is a sufficient release of the cause of action. *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183; 4 Am. Rep. 593. But if an agent unauthorizedly give a receipt in full on the partial payment of a disputed account, the principal will be entitled to the balance in a suit for the amount, notwithstanding the receipt given by the agent. *Pate's Case*, 4 Ct. of Cl. 523. But where, after the perpetration, by the defendant, of frauds upon the plaintiff, a settlement was had between the parties, and the plaintiff, in consideration of payments made or secured, under such settlement, gave a receipt which recited that it was a "receipt and settlement for all claims" against the defendant, it was held that such a receipt operated as a condonation of the tort, and a waiver of the plaintiff's right to arrest the defendant. *Nelson v. Blanchfield*, 54 Barb. (N. Y.) 630.

When a receipt has been given under seal it discharges at law all cause of action, and can only be set aside by the equitable jurisdiction of a court of law; but a mere receipt in writing has no such effect, it amounts simply to an acknowledgment of money paid; it cannot be pleaded in answer to an action, and it may be impeached or explained by parol evidence. *Lee v. Lancashire & Yorkshire Ry. Co.*, 25 L. T. (N. S.) 77; L. R., 6 Ch. 527; 19 W. R. 729. And see *State v.*

Gott, 44 Md. 341. But where a party accepts a deed in payment of a debt, and receipts the same, in ignorance of the fact that the deed is a nullity, there being no such property in existence as it assumes to convey, this will be no payment and he will not be concluded by his receipt. *Anderson v. Armsteud*, 69 Ill. 452.

An acknowledgment by the husband in the form of a receipt, that he had received from the wife the amount of paraphernal funds therein expressed, is conclusive between the husband and wife or their heirs, and is *prima facie* proof as to all other parties. Such evidence will authorize a judgment in favor of the heirs in a suit against their father in his capacity of tutor. *Matter of Smith*, 22 La. Ann. 253.

Admissions contained in a receipt given by a member of a religious society, for money paid to him on his ceasing to be a member of the community, to the effect that the receiptor had "withdrawn himself" from the community, are not conclusive in bar of a bill filed alleging his wrongful exclusion from the community, and praying an accounting and payment of a share of the assets. *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr. 66.

A receipt given for goods by a consignee is not binding in an action brought to recover because of the damaged condition of the goods at the time of their delivery by the common carrier. *Monell v. Northern Central R. R. Co.*, 16 Hun (N. Y.), 585; *Portland Bank v. Stubbs*, 6 Mass. 422.

§ 6. **May be explained or contradicted.** So far as a receipt goes only to acknowledge payment, it is merely *prima facie* evidence of the fact of payment, and may be contradicted by oral testimony, but so far as it contains a contract, it stands upon the footing of other writings containing contracts, and cannot be contradicted or varied by parol. *Morris v. St. Paul, etc., R. R. Co.*, 21 Minn. 91; *Stapleton v. King*, 33 Iowa, 28; 11 Am. Rep. 109; *Cesarini v. Ronzani*, 1 F. & F. 339; *Smith v. Holyoke*, 112 Mass. 517; *Wilson v. Derr*, 69 No. Car. 137. So a receipt "in full for logs to date" is open to contradiction by parol proof. *Smith v. Schulenberg*, 34 Wis. 41. So is a receipt in a broker's contract for the sale of stock, acknowledging the receipt of the first payment, or the margin on the contract. *Winans v. Hassey*, 48 Cal. 634. The rule also applies to a case where, upon payment of a portion of an undisputed account, the creditor gives a receipt in full. The creditor is not concluded thereby from recovering the balance, although the receipt was given with knowledge, and there was no error or fraud. *Ryan v. Ward*, 48 N. Y. (3 Sick.) 204. A shipping receipt "in full, on account, to date," is open to contradiction by parol proof. *Dolan v. Frieberg*, 4 W. Va. 101. And see *Trull v. Barkley*, 11 Hun (N. Y.),

644. So is a receipt "in full for services to date for services." *Foster v. Newbrough*, 66 Barb. (N. Y.) 645. And see *The Galloway C. Morris*, 2 Abb. (U. S.) 164. So is a receipt given to a common carrier acknowledging the receipt of perishable property "in good order." *Tierney v. N. Y. C. & H. R. R. Co.*, 10 Hun (N. Y.), 569. In short and in general, receipts when merely acknowledgments of delivery or payment, are not subject to the rule which excludes parol evidence to contradict or vary a written instrument. *Batdorf v. Albert*, 59 Penn. St. 59; *Middlesex v. Thomas*, 20 N. J. Eq. (5 C. E. Gr.) 39; *Draughan v. White*, 21 La. Ann. 175; *Walters v. Odom*, 53 Ga. 286; *Bowes v. Foster*, 2 H. & N. 779; 4 Jur. (N. S.) 95.

An ordinary receipt may be explained, controlled, qualified or even contradicted by parol evidence. *Pauley v. Weisart*, 59 Ind. 241.

And a general receipt between the maker and the payee of a promissory note, covering the date of the note, will not discharge the note, if it appears that it was not intended to do so. *Joslyn v. Capron*, 64 Barb. (N. Y.) 599. A receipt which is embodied in a promissory note is open to explanation by parol, the same as if it were a separate instrument. *Smith v. Holland*, 61 N. Y. (16 Sick.) 635.

A receipt for a note with the words "which I agree to account for on demand," is not a contract of bailment, nor within the rule which excludes parol testimony to vary a writing, but is explainable as a receipt especially by third persons. *Eaton v. Alger*, 2 Abb. (N. Y.) App. Dec. 5. And parol evidence is admissible to show that a receipt for personal property and an order for the payment of the price thereof, both of which were so worded as to leave the meaning doubtful, were signed by the purchaser as the agent of the person on whom the order was drawn. *Walker v. Christian*, 21 Gratt. (Va.) 291.

Although a written receipt may be contradicted, yet it is evidence of the highest and most satisfactory character, and to do away with its force, the testimony should be convincing, and not resting in mere impressions, and the burden of proof rests on the party attempting the explanation. *Winchester v. Grosvenor*, 44 Ill. 425. A receipt given by a party to common carriers for goods transported by them will not be set aside on the bare allegation that he never received such goods, with no explanation tending to explain how he came to make a formal admission of their receipt. *Chapman v. R. R. Co.*, 7 Phil. (Penn.) 204.

The plaintiff having a contract with the defendant, a corporation, did certain work not embraced in the contract, for which he made a claim of over \$4,000. Defendant's president offered plaintiff \$1,650, in settlement of the claim, which he accepted, and gave a receipt in full.

At the time he asked if he might apply to the full board of defendant's directors, for a further allowance, and was told he might. It was held that defendant was discharged from liability to the plaintiff; that the contradiction to which a receipt is subject is of some fact which is stated in it. The fact of a reservation of a right to apply to the board of directors for a reconsideration of the claim, and a further allowance at their option did not call for the overthrow of the written instrument, but was entirely consistent with it. *Green v. Rochester, etc., Manuf. Co.*, 1 Thomp. & C. (N. Y.) 5.

When a general receipt is given by an attorney for an evidence of debt then due, it will be presumed he received it in his capacity as attorney for collection; and it is incumbent on him to show he received it for some other purpose, if he would avoid an action for neglect in not collecting. *Executors of Smedes v. Elmendorf*, 3 Johns. (N. Y.) 185.

§ 7. **How interposed.** Properly a receipt is merely evidence of delivery or payment. It cannot be pleaded in answer to an action, and it may be impeached or explained by parol evidence. To take advantage, then, of a simple receipt, payment ought to be pleaded in defense and the receipt produced on the trial as presumptive evidence of the payment.

But as a receipt under seal discharges at law all cause of action and can only be set aside by the equitable jurisdiction of a court of law, it is, perhaps, proper to allege the receipt under seal itself as a defense to an action at law.

CHAPTER LVI.

REFORMATION OF INSTRUMENTS.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. In general. This subject has been quite fully discussed in Vol. 5 of this work, chapter 116, at pages 437 to 454. And what is there said as to the principles applicable in the prosecution of actions will apply with equal force in the discussion of the same principles relative to founding defenses thereon. Equity will with equal readiness, at the instance of either plaintiffs or defendants, reform written instruments, on the ground of fraud or mistake, upon parol evidence, when no statutory provision intervenes. *Schettiger v. Hopple*, 3 Grant (Penn.), 54. And see Vol. 5, at page 451.

§ 2. **When available as a defense.** See Vol. 5, pp. 437 to 454, chapter 116.

§ 3. **When not available.** Id.

§ 4. **What facts sufficient to authorize.** Id.

On February 21, 1870, one Reed, who was the owner of a number of pieces of land, conveyed to him by, and described in four different deeds, and constituting one farm, agreed with one Frone to sell such lands to him, and take back a mortgage for part of the purchase-price. By mistake the scrivener omitted from the deed and mortgage the description of one of the lots, and the papers were executed and delivered without either party having discovered its omission. Frone took possession of all the land agreed to be sold, and subsequently pointed out the boundaries thereof to the plaintiff, assuring him that the mortgage covered the whole farm. The plaintiff thereafter purchased the mortgage from Reed, all parties being then unaware of the mistake. In an action by the plaintiff to reform the deed and mortgage by inserting therein the description of the lot omitted, and to foreclose the mortgage as so reformed, it was held that the relief asked for should be granted. *Crippen v. Baumes*, 15 Hun (N. Y.), 136.

§ 5. **What not sufficient.** See chapter 116, *ante*, Vol. 5, pp. 437-454.

§ 6. **Who may interpose the defense.** Id. 451.

§ 7. **How interposed.** Id. 451-453.

CHAPTER LVII.

RELEASE.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition and nature. A release is the giving up or abandoning a claim or right to the person against whom the claim exists or the right is to be exercised or enforced. 2 Bouv. Law Dict. 434. Releases may either give up, discharge, or abandon a right of action, or convey a man's interest or right to another who has possession of it, or some estate in the same. Sheppard's Touchst. 320 ; Litt. 444 ; Bacon's Abr. In the former class a mere right is surrendered ; in the other not only a right is given up, but an interest in the estate is conveyed, and becomes vested in the releasee. See 2 Bouv. Law Dict. 434.

An express release is one directly made in terms by deed or other suitable means.

An implied release is one which arises from acts of the creditor or owner, without any express agreement.

A release by operation of law is one which, though not expressly made, the law presumes in consequence of some act of the releasor ; for instance, when one of several joint obligors is expressly released, the others are also released by operation of law. *Rowley v. Stoddard*, 7 Johns. (N. Y.) 207. But to have that effect, it must be a release under seal. *Irvine v. Millbank*, 56 N. Y. (11 Sick.) 635 ; *Morgan v. Smith*, 70 N. Y. (25 Sick.) 537. A release by parol of one joint debtor will not operate as a discharge to the others, and can only be pleaded by the one to whom it is given. *Ib.* ; *post*, p. 460.

Releases of claims which constitute a cause of action acquit the releasee, and remove incompetency as a witness resulting from interest. Littleton says a release of all *demands* is the best and strongest release. Sec. 508. But Lord COKE says *claims* is the stronger word. COKE, Litt. 291 b. And see 2 Bouv. Law Dict. 434.

§ 2. **Covenant not to sue.** A covenant not to sue upon a simple contract debt for a limited time is not pleadable in bar of an action for such debt. *Thimbleby v. Barron*, 3 M. & W. 210 ; *Walling v. War-*

ren, 2 Col. T. 434; *Perkins v. Gilman*, 8 Pick. 229. But see *Blair v. Reid*, 20 Tex. 310. But a covenant not to sue, generally, without any limitation of time, operates as a release of the debt and may be pleaded in bar. *Phelps v. Johnson*, 8 Johns. (N. Y.) 54; *Jones v. Quinnipiack*, 29 Conn. 25; *Thurston v. James*, 6 R. I. 103; *Hastings v. Dickinson*, 7 Mass. 153; *Millett v. Hayford*, 1 Wis. 401; *Stebbins v. Niles*, 25 Miss. 267; *Line v. Nelson*, 38 N. J. Law, 358; Vol. 6, pp. 602, 606. But a covenant not to sue one of the several obligors is not pleadable in bar to an action on the bond. It is a covenant only, and the covenantee is put to his cross action, to recover the damages which a breach may occasion him. *Line v. Nelson*, 38 N. J. Law, 358.

A covenant not to sue one of two or more joint debtors does not operate as a release to the others. *Hutton v. Eyre*, 6 Taunt. 289; 1 Marsh. 603; *Henderson v. Stobart*, 5 Exch. 99; 19 L. J. Exch. 135; *Winston v. Dalby*, 64 No. Car. 299; *Aylesworth v. Brown*, 31 Ind. 270; *Mason v. Jouett*, 2 Dana, 107; *Crane v. Alling*, 3 Green (15 N. J. Law), 423; *Matthey v. Gally*, 4 Cal. 62. Nothing short of full payment by one of several joint debtors, or a release under seal, can operate to discharge the other debtors from the contract. *Walker v. McCulloch*, 4 Greenl. (Me.) 421; *Snow v. Chandler*, 10 N. H. 92. But if the obligee of a bond covenants not to sue one of two joint and several obligors, and if he does, that the deed of covenant may be pleaded in bar, he may still sue the other obligor. *Dean v. Newhall*, 8 T. R. 168. In an action for a partnership debt, a covenant not to sue entered into by one only of the partners cannot be set up as a release. *Walmesley v. Cooper*, 3 P. & D. 149; 11 A. & E. 216. See Vol. 6, pp. 602, 606.

An instrument in writing in the form of a receipt for money paid on account of liability as one of several principal debtors is a covenant not to sue rather than a release; the consideration set out being the payment of a part of the debt, with a promise that the agreement should in no way affect the liability of the other principals. *Russell v. Adderton*, 64 No. Car. 417.

By a mortgage deed the debtor covenanted to pay principal and interest, and a surety covenanted to pay the interest in default. The debtor afterward, by deed, assigned his property to a trustee on trust to sell and divide the proceeds among his creditors; the creditors releasing the debtor from the debts due to them respectively. But there was a proviso in the deed that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor, and it was held that this deed only amounted to a covenant not to sue the debtor, and that the surety was

not released, but that the surety could pay off the principal to the creditor and recover the amount from the debtor. *Green v. Wynn*, L. R., 4 Ch. App. 204; 38 L. J. Ch. 220; 20 L. T. (N. S.) 131; 17 W. R. 385.

§ 3. **What a release is generally.** In Pennsylvania a release is sufficient if it is a release in substance, without being expressed in technical form; and the intention of the parties will be carried out in a court of law as fully as in a court of equity, and on equitable principles. *Gray v. McCune*, 23 Penn. St. 447.

A contract to forbear to claim dower is not a release, for a release operates presently and absolutely. *Croade v. Ingraham*, 13 Pick. 33; *Pixley v. Bennett*, 11 Mass. 298. And a contract not to sue will not be considered as a release where it is manifestly contrary to the intention of the parties. *Parker v. Holmes*, 4 N. H. 97. But a covenant not to sue, generally, without any limitation of time, operates as a release of the debt. *Phelps v. Johnson*, 8 Johns. 54. And see the preceding section. In a suit on a bond in the name of joint obligees, a paper under seal, signed by one of the plaintiffs, denying any authority for the use of his name in the suit, and forbidding its further prosecution, but containing no words showing an intention to discharge the cause of action, will not operate as a release. *Southwick v. Hopkins*, 47 Me. 362. And where a seaman in a whaling voyage, upon his discharge in a foreign port, signed a writing, acknowledging that he had received a certain sum, in full of his share of the proceeds of the voyage, and relinquishing all claims against the owners, master and officers, it was held that the relinquishment was only of the claim for which he had received compensation, and not of claims for personal violence committed by the master. *Payne v. Allen*, 1 Sprague, 304.

When the creditor voluntarily delivers up to his debtor a bond, note, or other evidence of his claim, the law will imply the release and discharge of any right of action of the creditor thereupon. *Beach v. Endress*, 51 Barb. 570; *Kent v. Reynolds*, 8 Hun, 559. But mere possession of a note by the payee, who testifies that it has not been paid, and where it also appeared that he had access to the payee's papers, will not operate as a discharge of the debt. *Grey v. Grey*, 47 N. Y. (2 Sick.) 552.

A mere parol agreement is not sufficient, of itself, to release an instrument under seal. But an executed parol agreement may have that effect, as it is not the agreement alone that is relied on, but the agreement coupled with acts done under it. *Dickerson v. Board of Commissioners, etc.*, 6 Ind. 128.

Residuary legatees having given up to a debtor of their testatrix a

policy on his life held by her as security for the debt, and having signified their intention of releasing the debt on his paying the probate and legacy duty on the debt, such payment is a good consideration for the release, and the debt is released. *Taylor v. Manners*, L. R., 1 Ch. App. 48.

A writing which recites that the maker, for a valuable consideration therein set forth — to wit, a mortgage — “Exonerates” the mortgagor from all notes or papers of such mortgagor, held by the maker or indorsed by him, operates as a release of all such notes. *Strong v. Dean*, 55 Barb. 337.

The holder of an obligation made by a firm, on receiving from one of the partners nearly half of the debt, gave him a receipt which contained the following clause: “I do hereby consent and agree that the other partners shall and will duly pay the balance on said obligation without further cost and detriment to the said T.” (T. being the partner who paid the money). The receipt was construed not to be a release, and as such, to operate to discharge the other partners, but merely a covenant to indemnify the partner who paid the money. *Kendrick v. O’Neil*, 48 Ga. 631.

An acknowledgment in a deed by a vendor that the purchase-money has been paid, and that the vendor is therewith fully satisfied amounts to a release. *Fawcett v. Porter*, 3 C. & K. 309.

§ 4. **Necessity for a seal.** A seal is not necessary to the validity of a release, unless it pertain to an interest in land; but a consideration must be expressed therein, unless there is a seal. *Benjamin v. McConnell*, 9 Ill. (4 Gilm.) 536; *Leviston v. Junction R. R. Co.*, 7 Ind. 597; *Kidder v. Kidder*, 33 Penn. St. 268; *Thomason v. Dill*, 30 Ala. 444. A release without consideration and not under seal is void. *Seymour v. Minturn*, 17 Johns. 169; *Jackson v. Stackhouse*, 1 Cow. 122. And it was an old maxim of the common law that an obligor could only be released by an instrument of as high dignity as that by which he was bound; being obligated by a seal, he could be released only by an instrument under seal. Technically this may be the rule of modern times, but practically it is not enforced. In all contracts for chattel interests, evidenced by sealed instruments, performance *in pais* will generally discharge all the parties to it. *White v. Walker*, 31 Ill. 422. And see *Davis v. Bowker*, 1 Nev. 487; *Dillingham v. Estill*, 3 Dana, 21. A release under seal is good without consideration. *Union Bank of Florida v. Cull*, 5 Fla. 409. A release, not under seal, of one of several covenantors, will not discharge the co-covenantors. *DeZeng v. Bailey*, 9 Wend. 336; *Morgan v. Smith*, 70 N. Y. (25 Sick.) 537; *ante*, p. 452, § 1; *post*, p. 460, § 9. And see *Bemis v. Hoseley*, 83

Mass. (16 Gray) 63; *McAllester v. Sprague*, 34 Me. (4 Redf.) 296; *Morgan v. Smith*, 70 N. Y. (25 Sick.) 537. But a release of one joint debtor is a release of the other, if it be a technical release under seal. *Armstrong v. Hayward*, 6 Cal. 183. And where two of three joint debtors have paid their due share, a release by the creditor of the third, on sufficient consideration, discharges the other two. *Campbell v. Brown*, 20 Ga. 415.

§ 5. **Validity in general.** A parol release of a sealed instrument is treated in equity as an agreement not to sue, and must be founded upon a sufficient consideration. *Albert v. Ziegler*, 29 Penn. St. 50. And a parol release of the whole sum when overdue, in consideration of part payment, is not a satisfaction of the whole. *Hope v. Johnston*, 11 Rich. Law (So. Car.), 135. A consideration of some kind is necessary to support a release not under seal. *Kidder v. Kidder*, 33 Penn. St. 268. Among valuable considerations there are no degrees of validity; and a release of property to the original debtors is not such a consideration as exempts the promise of a third party to pay his debts from the operation of the statute of frauds. As a collateral promise, such an engagement must be in writing. *Corkins v. Collins*, 16 Mich. 478.

A settlement between the parties and a release of a cause of action, in its nature not assignable, is a bar to an action commenced thereon, although by agreement between the plaintiff and his attorney at the commencement of the action the latter was to receive a share of any recovery therein for his services, and although the defendant had notice of the agreement. The defendant is not bound to care for the interests of the attorney; nor will the court intervene and allow the action to be prosecuted for the sole purpose of enabling the attorney to reap the benefits of the agreement. *Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. (26 Sick.) 443.

And where a judgment creditor, without consulting his attorney, who was cognizant of a successful levy of execution under the judgment, released the entire debt of \$1,633.33 in consideration of \$1,000, upon the debtor's concealment of the fact of the levy, and false representation that he was unable to pay the whole debt, it was held that the release was valid. *Reznor v. Maclary*, 4 Houst. (Del.) 241.

Where one files a lien for materials furnished for thirty houses, and afterward releases fifteen houses upon being paid the full value of the materials which went into those houses, his lien upon the remaining fifteen houses for the balance of his account is not affected by the release. *Hall v. Sheehan*, 69 N. Y. (24 Sick.) 618.

In order that a release, given by a seaman to the master of his vessel, of all claim for damages for assault and battery may be supported as a

bar to a subsequent suit by the seaman, it must have been given when he was absolutely free from duress, and must appear to be a reasonable satisfaction ; at least the contrary must not appear. *Mitchell v. Pratt*, Taney, 448.

Where an owner of land is disseized and his entry tolled by the descent cast, he may release his right of action without words of inheritance. The release inures by way of *mitter le droit*, and passes all the right of the releasor without words of limitation. *Shinn v. Holmes*, 25 Penn. St. (1 Casey) 142.

§ 6. **Obtained by fraud.** The common law affords to every one reasonable protection against fraud in dealing, but it does not go the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. 2 Kent (11th ed.), 646. In respect to intrinsic circumstances the rule is, that mere silence as to any thing which the other might by proper diligence have discovered, and which is open to his examination, is not fraudulent, unless a special trust or confidence exists between the parties, or be implied from the circumstances of the case. Story on Contracts, § 519. But the strict rules that apply between parties contracting at arm's length, in which the better knowledge of either party is his own property, have no application where a debtor is seeking to get a discharge from his indebtedness for less than its full amount, on the ground of his inability to pay more. An obligation rests upon such debtor not to induce or permit the action of his creditor by any false representation or material concealment or ignorance of any fact touching his own real condition. The utmost good faith is required on the part of the debtor, and he has no right to permit his creditor to act upon his belief in the correctness of representations previously made to him, which have become untrue by reason of changes in the debtor's own affairs. *Dambmann v. Schulting*, 12 Hun (N. Y.), 1 ; *Hardt v. Schulting*, 13 id. 537.

Releases, obtained from needy heirs just come of age, and ignorant of their rights, for an inadequate consideration, and by representations that their claims are worthless, are void in equity. *Hallett v. Collins*, 10 How. (U. S.) 174.

To support a replication of fraud to a plea of release of the debt, for which an action is brought, there must be evidence that the contents of the deed were misrepresented to the plaintiff, or that fraudulent misrepresentations were made to him to induce him to execute it. But if he merely lent his name for a collateral purpose, as to enforce contribution from a shareholder, and the action was not instituted for his benefit, and he did not instruct or retain the attorney who brought it,

such evidence will be no evidence to support the replication of fraud to a plea of the release. *Richards v. Turner*, 1 F. & F. 1.

S., in consideration of a railroad company's paying the funeral expenses of his child, killed by a train, while playing on the track, signed a release, under seal, of all damages for the child's death. S. afterward brought suit therefor, offering proof that he could not read, and that the release was procured by a fraudulent representation that it was a mere receipt, etc. The evidence was admitted under exception, and the court charged that the evidence of fraud was too slight to authorize the jury to set aside the release, but left the question of fraud to them upon the evidence. It was held that this was error, and that the case should have been withdrawn from the jury. *Pennsylvania R. R. Co. v. Shay*, 82 Penn. St. 198.

§ 7. **Who may give a release.** In an action on the case, in the nature of waste, brought by several plaintiffs, a release of the action by one of the plaintiffs is a good bar. *Kimball v. Wilson*, 3 N. H. 96. As a general rule, if one of two plaintiffs release a defendant after action without the consent of the other, the court will not set aside such release, unless fraud is clearly established. *Arton v. Booth*, 4 Moore, 192; *Crook v. Stephens*, 7 Scott, 848; 5 Bing. N. C. 688; *Wild v. Williams*, 6 M. & W. 490; *Jones v. Herbert*, 7 Taunt. 41. But where there are several plaintiffs, and one fraudulently gives a release to prejudice the real plaintiff, and that release is pleaded, the court will set aside that plea, and order the release given to be delivered up to be canceled. *Barker v. Richardson*, 1 Y. & J. 362. So, where one of several assignees of a bankrupt releases the cause of action, and the release is pleaded, the court will set aside the plea, suspicion being thrown on the defendant's conduct in the transaction, the co-plaintiffs indemnifying the plaintiff, who had given the release, against costs. *Johnson v. Holdsworth*, 4 D. P. C. 63.

Where an action was brought by two as executors, the court refused to set aside a plea of release given by one. *Anon.*, 1 Chit. 391, *n.* And where an action was brought by two out of four executors, and the two who were not joined in the action released *puis darrien continuance*, the court refused to set aside the plea, the plaintiff having failed to make out a case of fraud. *Herbert v. Pigott*, 2 C. & M. 384; 4 Tyr. 285; 2 D. P. C. 392.

The legislature has power to relinquish a claim of the State, or to waive its remedies for a fraud. *The People v. Stephens*; *Same v. Leahy*, 71 N. Y. (26 Sick.) 527.

B, without the plaintiff's knowledge or consent, executed under his hand and seal a written instrument expressing a consideration acknowl-

edging full satisfaction of a bond which he subsequently assigned to the plaintiff, and consenting to its cancellation; no consideration was in fact paid. It was held that the instrument was an extinguishment of the bond and guaranty so far as B had a right therein, and he could thereafter transfer no interest to another. *Simson v. Brown*, 68 N. Y. (23 Sick.) 356.

A release of damages by a husband, for the personal abuse of his wife, is a good bar to a joint action by the husband and wife for the same cause. *Southworth v. Packard*, 7 Mass. 95.

The attorney on record cannot, without special authority, execute a valid release to one who is liable over to his client, in order to render him a competent witness. *Marshall v. Nagel*, 1 Bailey (So. Car.), 308.

A plaintiff suing *in forma pauperis* may execute a release of the cause of action to the defendant, without the consent or knowledge of his attorney, if it is done *bona fide*, with a view to settle the action, and not from any intention to deprive the attorney of his costs. *Jones v. Bonner*, 5 D. & L. 718; 2 Exch. 230; 17 L. J. Exch. 343.

If a person who is sued by a landlord, in the name of his tenant, procure a release from the nominal plaintiff, the court will order the release to be delivered up and permit the landlord to proceed. *Payne v. Rogers*, 1 Dougl. 407.

A general release, given by a trustee, in fraud of his trust, is void. *Manning v. Cox*, 7 Moore, 617.

A mere discharge, signed by both husband and wife, when the latter acknowledges the receipt of a sum of money, is not sufficient to shift the *onus* of a negative proof on the wife. *Breaux v. Le Blanc*, 16 La. Ann. 145.

Although a release to a mere stranger is wholly inoperative, yet a contingent remainder or executory devise, where the contingency is merely attached to the event on which it is to vest, may be released to any party possessed of an interest in the land. *Matlock v. Lee*, 9 Ind. 298.

A naked possibility, or remote possibility, is incapable of being released, for a release must be founded on a right *in esse*. *Needles v. Needles*, 7 Ohio (N. S.), 432.

§ 8. Release by one of several creditors. See section next preceding.

A release under seal by one partner in the firm, of a debt due to the copartnership, is binding on all the partners. *Pierson v. Hooker*, 3 Johns. 68; *Salmon v. Davis*, 4 Binn. 375; *Wilkinson v. Lindo*, 7 M. & W. 81; *Furnival v. Weston*, 7 Moore, 356. But a release by two

lessees will not bar a third from an action against a landlord, unless the covenant was joint. *Eisenhart v. Slaymaker*, 14 S. & R. 153.

A release by one of the plaintiffs who were tenants in common, in an action of trespass, is a bar to the action. *Austin v. Hall*, 13 Johns. 286; *Decker v. Livingston*, 15 Johns. 479. So is a release by one of two joint covenantees. *Fitch v. Forman*, 14 Johns. 172. But a release by one of two lessors of the plaintiff is no bar to a recovery in an action of ejectment, in New York, such release affecting only the *quantum* of interest. *Jackson v. McClaskey*, 2 Wend. 541.

A release by one of the plaintiffs is a bar to an action of assumpsit by the owner of a vessel against its master, for earnings. *Hall v. Gray*, 54 Me. 230.

A release by two of three joint obligees is a bar to a suit by the third, brought in the name of the three, for one-third of the benefit of the contract. In such joint action the plaintiffs cannot set up that such release was a fraud on one of their number, and thus deprive the defendant of a legal defense to the claim of the three. *Myrick v. Dame*, 9 Cush. (Mass.) 248.

§ 9. **Release of one of several debtors.** A release of one of several obligors, whether they are bound jointly or jointly and severally, discharges the others, and may be pleaded in bar by all; but, to have this effect, it must be a technical release under seal. *Line v. Nelson*, 38 N. J. Law, 353; *Berry v. Gillis*, 17 N. H. 9; *Ayer v. Ashmead*, 31 Conn. 447; *McAllister v. Dennin*, 27 Mo. (6 Jones) 40; *Armstrong v. Hayward*, 6 Cal. 183; *Frink v. Green*, 5 Barb. (N. Y.) 455; *Shaw v. Pratt*, 22 Pick. 305; *ante*, p. 452, § 1. The strict rule of law is, that a release of one of several joint debtors, or joint and several debtors, is a release of all. *American Bank v. Doolittle*, 14 Pick. 123; *Brown v. Marsh*, 7 Vt. 320, 327; *Bunson v. Kincaid*, 3 Penn. St. 57; *Benjamin v. McConnell*, 9 Ill. (4 Gilm.) 536; *Vandever v. Clark*, 16 Ark. 321; *Taylor v. Galland*, 3 Iowa (G. G. Greene), 17; *Booth v. Campbell*, 15 Md. 569; *Cornell v. Masten*, 35 Barb. 157. But the rule is otherwise in equity. *State v. Matson*, 44 Mo. 305. A release of the principal will always discharge the surety. *Id.*; *Veazie v. Williams*, 3 Story, 611. But one surety may be discharged without prejudice to an action against the others, to the extent that they would be liable in a suit for contribution between themselves. *State v. Matson*, 44 Mo. 305. And where two or more persons are bound jointly, the claimant may release one and reserve his remedy against the others, with their consent. *Campbell v. Booth*, 8 Md. 107. And where a release of one of several obligors showed upon its face, and in connection with the surrounding circumstances, that it was not

the intention of the parties to release the co-obligors, and the court was convinced that the whole scheme of procuring a separate release of one of the obligors was a plan of 'all for escaping the full payment of an honest debt, the instrument was construed merely as a covenant not to sue, and the co-obligors were held not to be discharged. *Parmelee v. Lawrence*, 44 Ill. 405. And see *Burke v. Noble*, 48 Penn. St. 168; *Greenwald v. Kaster*, 86 id. 45; *Bolen v. Crosby*, 49 N. Y. (4 Sick.) 183.

If the creditor of a corporation, by an instrument under seal, release a stockholder from all personal liability for his debt, he thereby discharges the corporation and the other stockholders to the same extent as the one to whom the release is executed. *Prince v. Lynch*, 38 Cal. 528. If such a release be for the releasee's "proportion" of the indebtedness of the corporation, the company and the other stockholders are only released *pro tanto*. *Id.*

It may be said then that, at law, the release of one or more persons who are jointly or jointly and severally bound is a discharge of all, unless it appears from the instrument, or the circumstances and relations of the parties, it cannot reasonably be supposed to have been so intended. *Bonney v. Bonney*, 29 Iowa, 448; *Neligh v. Bradford*, 1 Neb. 451.

§ 10. **Release of one of several tort-feasors.** A release of one joint trespasser is a release of all; it operates as a satisfaction. *Brown v. Marsh*, 7 Vt. 320, 327; *Abel v. Forgue*, 1 Root, 502; *Gould v. Gould*, 4 N. H. 173; *Irwin v. Scribner*, 15 La. Ann. 583; *Ayer v. Ashmead*, 31 Conn. 447. But a release, not under seal, of one joint trespasser, showing on its face that it was not intended to affect the liability of others, will not operate to discharge the action. *Bloss v. Plymale*, 3 W. Va. 393; *Matthews v. Chicopee Manf. Co.*, 3 Rob. (N. Y.) 711. But a release, under seal, of one of three joint tort-feasors, as here, in removing the lateral support of the releasor's buildings, bars the right to recover from the others. *Gunther v. Lee*, 45 Md. 60; 24 Am. Rep. 504.

After rendition of judgment against several sued as tort-feasors, they become joint debtors, within the meaning of the joint debtor's act; and the plaintiff may compromise with one, and discharge him from liability without affecting the liability of the others for the balance remaining due on the judgment, or discharging them therefrom. *Irvine v. Millbank*, 36 N. Y. Supr. Ct. (4 J. & Sp.) 264; 14 Abb. (N. S.) 408; 15 id. 378; 56 N. Y. (11 Sick.) 635.

§ 11. **Operation and effect, generally.** A release operates upon those matters expressed therein which exist at the time of giving the same; but it will not operate prospectively to defeat an action the cause

of which may arise afterward. *Cocke v. Stuart*, Peck (Tenn.), 137; *Francis v. Boston, etc., Mill Corp.*, 4 Pick. 365, 368; *Ashtun v. Freestun*, 2 M. & G. 1; *Hartley v. Manton*, 5 Q. B. 247. It cannot operate to cut off a promise of which it was the consideration. *Allen v. Frisbee*, 2 Root, 76. But a release of all debts, dues and demands, discharges a note given for the interest of another note, although the note for the principal was excepted in the release. *Howell v. Seaman*, 1 Root, 383. A release, where neither of the parties to it have any possession, actual or legal, in the land released, passes nothing. *Porter v. Perkins*, 5 Mass. 233; *Bennett v. Irwin*, 3 Johns. 363. But a release to one in possession of lands, whether by right or wrong, will operate to pass such right, if made by one having a right to the same. *Poor v. Robinson*, 10 Mass. 131, 134.

A general release of all demands may operate to discharge debts due to the releasor as executor although it be not signed by him as executor. *Sherburne v. Goodwin*, 44 N. H. 271. But though a release is general in its terms, the court will limit its operation to matters contemplated by the parties at the time of its execution. *Lyall v. Edwards*, 6 Hurl. & Nor. 337; 10 L. J. Exch. 193; *Upton v. Upton*, 1 D. P. C. 400. So a release general in its terms was limited so as not to include a particular debt unknown to exist at the time of its execution and not intended to be released. *Moore v. Weston*, 25 L. T. (N.S.) 542.

A release of all damages on account of the laying out of or construction of a railroad through and over the land of the releasor, does not cover damages occasioned to the remaining land of the releasor by the construction of the railroad over the land of other persons. *Euton v. Boston, etc., R. R. Co.*, 51 N. H. 504; 12 Am. Rep. 147.

Where a distress for rent has been levied on goods, and they have been replevied, and the matter was compromised and a release given to the tenant, discharging him from all claims and liabilities for rent provided for in the lease, the release was held to relate only to rents which had accrued up to the time of settlement. *Law v. Bentley*, 25 Ill. 52.

A release to a debtor for all claim on him for the debt does not, if not so intended, discharge a subsisting lien for the same debt. *Pierce v. Sweet*, 33 Penn. St. 151. But a release from the indorser of a note in the hands of a holder, to the maker, "of all claims and causes of action in law or equity," covers the indorser's contingent demand against the maker and extinguishes it. *Guynemer v. Lopez*, 11 Rich. Law (So. Car.), 199.

A party to a composition deed, executing the release thereby re-

quired of all claims and demands against the grantor, is not to be prevented from retaining a note assigned to him in good faith by the grantor, before the execution of the deed, in discharge or payment of a *bona fide* debt. *Lambert v. Jones*, 2 P. & H. (Va.) 144.

A formal release of one of several tracts under a mortgage does not discharge the other tracts. *Culp v. Fisher*, 1 Watts, 494. And where the distributees of an intestate estate, on receiving from the administrator the estimated value of the assets of the estate, executed a release to him, under seal, of all claims to the whole of the estate both real and personal, it was held that this release did not include a right of entry which the intestate had reserved in land granted to a church, and which was to be forfeited by any change in the creed of the church, or use of the land for other purposes. *Wilcoxon v. Harrison*, 32 Ga. 480.

The legal effect of a release of contract made and to be executed in a particular State is primarily to be determined by the laws of that State. *Holdridge v. Farmers, etc., Bank*, 16 Mich. 66.

Where a condition is disjunctive, the release of one alternative releases the other also. *Smith v. Durell*, 16 N. H. 344. And the release of a debt or obligation discharges all collateral securities. Id.

A release, not under seal, of one of two joint debtors, from his share of the debt, does not, in a suit against both, operate to discharge either, although the party released may have a right of action for the breach of his contract of discharge. *Drinkwater v. Jordan*, 46 Me. 432. See *ante*, § 9, p. 460.

If, on the trial of a cause, a release is given to render a witness competent, and the releasee avails himself of the benefit of his testimony, the release is a bar to any future action against the releasee upon a cause of action covered by the release, unless the same were procured by fraud, or by the fraudulent representations of the releasee, as to the testimony he would give. *Bradley v. Grosh*, 8 Penn. St. 45.

A parol release without payment or satisfaction is no extinguishment of the debt. *Sigourney v. Sibley*, 21 Pick. 101.

If the holder of a note, after the time of payment, and after suit has been commenced against the indorser, release the maker by writing not under seal, and without consideration, such release is void, and is no defense in the action against the indorser. *Crawford v. Millspaugh*, 13 Johns. 87.

A release from suits may be made subject to a condition subsequent, so that if such condition subsequent is not complied with, the release will be void, and the suits may proceed. *Hull v. Levy*, L. R., 10 C. P. 154; 11 Eng. 312; 31 L. T. (N. S.) 727; 23 W. R. 393.

An instrument under seal wherein one party agrees to dismiss a cer

tain suit he has pending against the other, although it also contains a transfer of all his interest in certain land, a title bond for which was the foundation for such suit, and an agreement to deliver up such bond, operates as a release of the action, and may be so pleaded. *Stinson v. Moody*, 3 Jones' Law (No. Car.), 53.

A release of a debt "in like manner as if the debtor had obtained a discharge in bankruptcy," is an absolute release, which, if given without the surety's consent, discharges the surety. *Gragee or Cragee v. Jones*, L. R., 8 Exch. 81; 21 W. R. 408; 42 L. J. Exch. 68.

§ 12. **How far conclusive.** A release under seal is conclusive between the parties, in the absence of any showing of fraud in obtaining it. *Sherburne v. Goodwin*, 44 N. H. 271; *Ellsworth v. Fogg*, 35 Vt. (6 Shaw) 355; *Perkins v. Fourniquet*, 14 How. (U. S.) 313; *West v. Morris*, 98 Mass. 353. And when it is made by an executor, it will, in the absence of fraud, bind also the residuary legatees. *Sherburne v. Goodwin*, 44 N. H. 271.

A debt of record may be discharged by a release under seal. *Barker v. St. Quentin*, 12 M. & W. 441; 1 D. & L. 542; 13 L. J. Exch. 144.

§ 13. **Construction.** A release may be construed according to the particular purpose and intent for which it was made. *Solly v. Forbes*, 4 Moore, 448; 2 B. & B. 38; *Seymour v. Butler*, 8 Clarke (Iowa), 304; *Fazakerly v. McKnight*, 6 El. & Bl. 795; 2 Jur. (N. S.) 1020; 26 L. J. Q. B. 30. And in construing releases, especially where the same instrument is to be executed by various persons, standing in various relations, and having various kinds of claims against the releasee, general words, though the most comprehensive, are to be limited to particular demands, where it manifestly appears, by the consideration, by the recital, and by the nature and circumstances of the demands, to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties. *Rich v. Lord*, 18 Pick. 322; *Payler v. Homersham*, 4 M. & S. 423; *Lindo v. Lindo*, 1 Beav. 496; *Lyall v. Edwards*, 6 H. & N. 337; *Boyes v. Bluck*, 13 C. B. 563; 22 L. J. C. P. 173.

Where there are only general words in a release they are construed most strongly against the releasor. *Jackson v. Stackhouse*, 1 Cow. 122. A release "from all claims, demands, actions and causes of action, which I now have against him, whether in my own name or in the name of other persons, held by me, or owned by me, and particularly from the debts and costs in two actions" (specified), "which are to be entered 'neither party,'" is a general release. *Dunbar v. Dunbar*, 5 Gray (Mass.), 103. But a release of all actions and causes of action against J. S. is not a release of a cause of action against a firm of which J. S. is a member. *Reading R. R. v. Johnson*, 7 Watts & Serg. 317. And

a general release of all demands does not reach demands held by the releasor as executor. *Wiggins v. Norton*, R. M. Charl. 15. A release by a son of all his present or future interest in his father's estate, either by will, descent, or otherwise, together with a covenant of non-claim, if made without fraud and with the father's consent, will effectually bar any claim of such interest by the releasor, either at law or in equity. *Curtis v. Curtis*, 40 Me. 24.

A release to one not in possession, if made for a valuable consideration, will be construed to be any lawful conveyance by which the estate might pass. *Pray v. Pierce*, 7 Mass. 381.

A deed of release of shares in a turnpike corporation will be held to operate as a grant, in order to effect the intention of the parties. *Hastings v. Blue Hill Turnp. Corp.*, 9 Pick. 80.

A deed *inter partes* cannot operate as a release to strangers; therefore, a charter-party between A and B, in consideration of the freight B was to pay, was thereby declared null and void, A agreeing to cancel the first in consideration of the second, and C was thereby acquitted of all claims which A might have against him in virtue of the first charter-party, does not operate as a release from A to C of the first charter-party. *Storer v. Gordon*, 3 M. & S. 508.

§ 14. **How pleaded and proved.** A plea of release, which does not answer all it professes to do, being bad in part is bad in the whole. *St. Germain's (Earl) v. Willan*, 3 D. & R. 441; 2 B. & C. 216. And a plea of release pleaded *puis darrein continuance* after a demurrer and joinder in demurrer, operates as a retraxit of the demurrer. *Solomon v. Graham*, 1 Jur. (N. S.) 1070; 24 L. J. Q. B. 332.

In debt on a writing obligatory, a plea of release should allege that the release was under seal. *Griggs v. Voorhies*, 7 Blackf. 561; *Bender v. Sampson*, 11 Mass. 42; *Gibson v. Weir*, 1 J. J. Marsh. 446. A release is not admissible unless pleaded. *Johnson v. Kerr*, 1 S. & R. 25. And an averment against the express words of a written discharge is not admissible. *Palmer v. Corbin*, 1 Root, 271. The recital of a release is not such evidence of its existence as will oblige a vendee of the land covered by it to pay the purchase-money. *Smith v. Webster*, 2 Watts, 478. Where a covenant not to sue is pleaded, if the covenantee is a sole debtor, it will be a release in bar of any action; but if he is one of two or more debtors, such covenant cannot be pleaded. *Shed v. Pierce*, 17 Mass. 623, 628; *Goodnow v. Smith*, 18 Pick. 414.

Where a defendant, in an action of trespass, pleaded a "writing or release" by the plaintiff, setting it forth in his plea as follows: "Received of A, this 22d Sept., 1834, \$1, in full of all demands to this date. B." It was held that the instrument so recited was not a tech-

nical release, and that the pleader, having set forth the instrument in his plea, did not intend to plead it as a release. *Tucker v. Baldwin*, 13 Conn. 136. And in an action on a bond, where the defendant pleaded that after executing the bond, an agreement was made by and between the plaintiff and the defendant and divers other persons, and sealed with the plaintiff's seal; and that it was agreed, by the agreement, that the agreement might be pleaded by the defendant in bar to all demands and proceedings with respect to the alleged claim on the bond, it was held that the plea ought to have set out so much of the deed as operated as a release, and to have expressly averred that the deed did so operate, and that therefore the plea was bad in substance. *Wilson v. Braddyl*, 9 Exch. 718; 25 Eng. Law & Eq. 550; 23 L. J. Exch. 227.

A plea of release to a bill for an account is not void because it is not stated in such plea, nor in the answer in support thereof, that the release was obtained freely and without fraud, unless the bill contains allegations of fraud which, if true, would avoid the release. *McClane v. Shepherd*, 21 N. J. Eq. 76.

A release of all demands by a daughter who has been seduced, to the seducer, cannot be set up in bar to an action by the mother for the injury arising to her by the seduction. *Gimbel v. Smid*, 7 Ind. 627.

The entries in the bill of costs of a deceased attorney are good secondary evidence of the execution of mutual releases. *Skeffington v. Whitehurst*, 3 Y. & C. 1.

§ 15. **How impeached.** A party to a release, who means to deny it when it is set up by the other party as a defense, must reply *non est factum*; and if he puts in a replication denying that the legal operation and effect of the release are such as to discharge the defendants, the replication is demurrable. *Denniston v. Mudge*, 4 Barb. 243. But a reply is not necessary under the New York Code to enable the plaintiff to show that a release of the claim sued upon, set up in the answer, was fraudulently procured. Accordingly, where, in an action to set aside a release for fraud, the complaint set forth that in an action previously brought, and then pending, upon the claim to which it referred, it had been set up as a defense, it was held that a demurrer was properly sustained. *Dambman v. Schulting*, 6 Thomp. & C. (N. Y.) 251; 4 Hun, 50.

The provision of the Revised Statutes which permits an inquiry into the consideration of a sealed instrument has not altered the rule of the common law, by which a release under seal operates *per se* as an extinguishment of the debt to which it refers, and although liable to be avoided by proof that it was obtained through fraud or duress, it is not

open to contradiction by parol evidence. *Stearns v. Tappin*, 5 Duer (N. Y.), 294. As to when a release is to be avoided by duress of property, see *Spaids v. Barrett*, 57 Ill. 289; 11 Am. Rep. 10. A court of law has no jurisdiction to set aside a release which is good in law; but in the exercise of its equitable jurisdiction it may interfere to prevent a defendant from pleading a release where it would be a manifest fraud on a third party seeking to enforce a demand against the defendant, and a party to the fraud. *Phillips v. Clagett*, 11 M. & W. 48; 2 D. (N. S.) 1004; 12 L. J. Exch. 275. Where a release of a legal demand has been improperly obtained, a court of equity will set aside the release, but will not decree payment of the legal demand. *Pascoe v. Pascoe*, 2 Cox, 109. And a party who, upon a compromise, has executed a general release, claiming relief on the ground of a large item in which he was interested having by mistake been omitted in the account, is entitled to relief, but to obtain it the release must be wholly set aside. *Pritt v. Clay*, 6 Beav. 503.

But where mutual releases of all demands were executed by mutual agreement, and the defendant gave up his notes to the plaintiff, the plaintiff cannot avoid the effect of this settlement by showing that he labored under a mistake as to the amount of his own account. *Blackmer v. Wright*, 12 Vt. 377.

Where a release has been executed and the parties have for a long space of time acquiesced in it, the mere proof of errors will not, in the absence of fraud, induce the court either to set it aside or to give leave to surcharge and falsify; but the nature and amount of the errors alleged and proved may have a very considerable effect in the consideration of the question whether the release was fairly obtained. *Millar v. Craig*, 6 Beav. 433. The fact that a party executing a release supposed it to be a mere receipt is not sufficient to invalidate the instrument, unless she had reasonable grounds for such supposition. *Schmidt v. Herfurth*, 5 Rob. (N. Y.) 124. And evidence of collusion between the parties to the release will not be admitted to change the effect of the release. *Hall v. Gray*, 54 Me. 230.

§ 16. **Release of errors.** Where there is a judgment against two on a bond, and one gives a release of errors, the release may be pleaded in bar of a writ of error *quoad* him who released, but not against his co-defendant. *Clark v. Goodwin*, 1 Blackf. 74; *Henrickson v. Van Winkle*, 21 Ill. 274. A release of errors, executed for the purpose of procuring an injunction, may be pleaded in bar of a writ of error, although the injunction had been refused and the bill dismissed. *Millar v. Farrar*, 2 Blackf. 219.

An agreement in writing under seal by the defendant, that the title to the property in controversy is in the plaintiff, and expressing the desire that the suit be tried upon its merits, without regard to error in the proceedings, so that the finding may be that it is the property of the plaintiff, so as to vest the title in him fully by the judgment of the court, has the effect of a release of errors. *Martin v. Hawkins*, 20 Ark. 150.

CHAPTER LVIII.

RESCINDING INSTRUMENTS.

ARTICLE I.

GENERAL RULES.

Section 1. Definition and nature. Rescinding a contract is abrogating or annulling it. See *ante*, Vol. 5, p. 507. A contract may be rescinded by mutual consent. *DeBernardy v. Harding*, 8 Exch. 822; 22 L. J. Exch. 340; *Heinckey v. Earle*, 8 El. & Bl. 410. It may take place as the act of one party in consequence of a failure to perform by the other. *Lawrence v. Dale*, 3 Johns. Ch. 23; 17 Johns. 437. But a contract cannot be rescinded by one party for the default of the other, unless both can be put *in statu quo* as before the contract. *Hunt v. Silk*, 5 East, 449; 2 Smith, 15; *Franklin v. Miller*, 4 A. & E. 599; *Clay v. Turner*, 3 Bibb, 52; *Pintard v. Martin*, 1 S. & M. (Miss.) Ch. 126. And it may take place on account of fraud, even though the contract be partially executed. *Clarke v. Dickon*, El., Bl. & El. 148; *Vane v. Cobbold*, 1 Exch. 798; *Marston v. Brackett*, 9 N. H. 336; *Hotchkiss v. Fortson*, 7 Yerg. (Tenn.) 67.

§ 2. **What is good ground for.** See *ante*, Vol. 5, chap. 118, pp. 510–519, where this subject is quite fully discussed.

It is not necessary, to authorize the rescinding of a contract of sale, that the sale should have been made solely in reliance upon false representations. And when a vendor has disaffirmed a sale on account of fraud, he may reclaim by an action in replevin such of the goods sold as are within his reach, and at the same time maintain an action against the vendee to recover damages for those that have been disposed of. *Hersey v. Benedict*, 15 Hun (N. Y.), 282.

Where some act is to be done by each party under a special agreement, and the defendant by his neglect prevents the plaintiff from carrying the contract into execution, the plaintiff may recover back any money paid under it. *Giles v. Edwards*, 7 T. R. 181.

§ 3. **What not a sufficient ground.** See *ante*, Vol. 5, chap. 118, pp. 507–519.

A person may, at his own option, rescind the contract, and return back the price, if he can return what he has received under it, where

he was induced by fraud to enter into the contract, and paid money under it. But when he can no longer place the parties *in statu quo*, as if he has become unable to return what he has received, in the same plight as that in which he received it, the right to rescind no longer exists, and his remedy must be by an action for deceit, and not for money had and received. *Clark v. Dickson*, El., Bl. & El. 148.

Inadequacy of value is not, in itself, sufficient to set aside a contract. *Griffith v. Spratley*, 1 Cox, 383; *Marshall v. Collett*, 1 Y. & C. 232; *Abbott v. Swooner*, 4 DeG. & S. 448; *Davies v. Cooper*, 5 Mylne & C. 270. And see *ante*, p. 507, Vol. 5, chap. 118.

§ 4. **Duty of rescinding party.** See *ante*, Vol. 5, pp. 508, 509, 522.

§ 5. **Effect of rescission.** *Id.*, chap. 118.

§ 6. **Who may enforce.** *Id.*, pp. 521–523.

To enable one who is not a party to a contract to claim to enforce it, he must either be named in it, or clearly designated as the person for whose benefit it is made. *Peddie v. Brown*, 3 Macq. H. L. Cas. 65; 3 Jur. (N. S.) 895.

Where A and two others join in an action on a contract, on the deposit of goods by the three, with the defendant, who was not to give them up without the joint order of the three, and they were given up without such joint order, and the defendant pleaded that they were given up to A at his request, the plea was held to be good; for A being disabled from suing for what he himself had done, could not sue, though joining others with him. *Brandon v. Scott*, 7 El. & Bl. 234; 3 Jur. (N. S.) 362; 26 L. J. Q. B. 163.

CHAPTER LIX.

RESCUE.

ARTICLE I.

GENERAL RULES.

Section 1. Definition and nature. A rescene, as connected with the law of distresses, occurs where the owner, or other person, takes away by force, a chattel distrained, from the party distraining. It is requisite, however, that such person shall have had actual possession of the thing or it will not amount to a rescue. Hence, if a man come upon the land to make a distress, and is disturbed or prevented, rescue will not lie, but he will be entitled to bring a special action on the case for the wrongful disturbance.

The term "rescue" means the setting at liberty, against law, the person or goods of another, arrested or seized by process or course of law. 1 Inst. 160 *b*. It is laid down, that whatever is such a prison, as the party himself would, by the common law, be guilty of felony in breaking from, a stranger would be guilty of as high a crime at least in rescuing him from it. Although upon the principle that, wherever the arrest of a felon is lawful the rescue of him is a felony, it will not be material whether the party arrested for felony, or suspicion of felony, be in the custody of a private person or of an officer, yet, if he be in the custody of a private person, it seems that the rescuer should be shown to have knowledge of the party being under arrest for felony.

§ 2. **When a defense.** When a distress is taken without cause, or where rent is not due, or if the owner tender the rent before the distress taken, the owner may lawfully, before the distress is impounded, make rescene; but after the distress is once regularly impounded, the owner cannot break the pound, or liberate the chattel, for it is then in the custody of the law, and a pound-keeper is compelled to receive every thing offered to his custody, and is not answerable whether the impounding were legal or not.

If a person take cattle from the lawful custody of a field driver, when driving them to the pound, it is a rescue, although they are never

out of his sight, and are finally yielded to him and impounded. *Vinton v. Vinton*, 17 Mass. 342. The illegality of a distress is a good bar to an action, under the Massachusetts statute, for a rescue. *Melody v. Reab*, 4 Mass. 471. The penalty prescribed under that statute does not extend to a rescue of neat cattle. *Berry v. Ripley*, 1 Mass. 167.

The officer's return of a rescue is conclusive evidence of such fact. *Buckminster v. Applebee*, 8 N. H. 546.

§ 3. **When not a defense.** A rescue before commitment is not an excuse for the officer, where the arrest is by virtue of an execution *Cargill v. Taylor*, 10 Mass. 206.

§ 4. **Who may interpose.** See preceding sections.

§ 5. **How interposed.** Rescue is generally deemed the ground of an action, and rarely, if ever, does it become a defense. To an action of rescue of goods distrained, we assume, as has been seen above, that the illegality of the distress might be shown as a bar. However, if rescue should be a defense, the manner of interposing it would be the same as the interposition of any other affirmative defense.

CHAPTER LX.

SET-OFF.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition and nature. Set-off has been variously defined. But it may be briefly described as “a mode of defense whereby the defendant acknowledges the justice of the plaintiff’s demand on the one hand, but on the other sets up a demand of his own to counter-balance it, either in whole or in part.” Tomlin’s L. Dict. And see 2 Bouv. Dict. 515; Byles on Bills, 360; Brown’s L. Dict. 321. Or, a set-off is made where the defendant has a debt against the plaintiff, arising out of a transaction independent of the contract on which the plaintiff sues, and desires to avail himself of that debt, in the existing suit, either to reduce the plaintiff’s recovery or to defeat it altogether, and, as the case may be, to recover a judgment in his own favor for a balance. *Avery v. Brown*, 31 Conn. 398, 401. A set-off is, therefore, in the nature of a cross-action, and to maintain it the same principles must govern in the one as in the other. *Chase v. Strain*, 15 N. H. 535; *Mitchell v. McLean*, 7 Fla. 329; *Everson v. Fry*, 72 Penn. St. 326; *Barnes v. Shelton*, Harp. (So. Car.) 33; *M’Dowell v. Tate*, 1 Dev. (No. Car.) 249; *Lewis v. Denton*, 13 Iowa, 441. A payment is merely the extinguishment of the debt, and is not in the nature of a set-off, which may be used or omitted as a defense, at the pleasure of the defendant. *Broughton v. McIntosh*, 1 Ala. 103. See *Hill v. Austin*, 19 Ark. 230. That a set-off is not strictly a defense, see *Curran v. Curran*, 40 Ind. 473.

As a remedy, set-off was unknown to the common law, according to which, mutual debts were inextinguishable, except by actual payment or release (*Commonwealth v. Clarkson*, 1 Rawle [Penn.], 291; *Meriwether v. Bird*, 9 Ga. 594); or, at most, the right of set-off at common law was limited to cases of mutual connected debts, and did not extend to debts unconnected with each other. *Hurlbert v. Pacific Ins. Co.*, 2 Sumn. (C. C.) 471, 477; *White v. Governor*, 18 Ala. 767; *M’Lean v. M’Lean*, 1 Conn. 397; *Baltimore Ins. Co. v. McFaddon*, 4

Har. & J. (Md.) 31. But the doctrine of set-off has always been recognized in the civil law by the term "compensation" (See *Beatty v. Scudday*, 10 La. Ann. 404; *Kean v. Brandon*, 17 id. 37; *New Orleans v. Finnerty*, 27 id. 681; 21 Am. Rep. 569; *Slaughter v. Hailey*, 21 Tex. 537); and has been adopted into all the systems of jurisprudence copied from that law. See *Carpenter v. Butterfield*, 3 Johns. Cas. 144, 155. Although founded confessedly in justice and sound policy, it was not adopted into the common law of England, until reluctantly and cautiously introduced under the pressure of glaring necessity by successive but limited statutes. *Spurr v. Snyder*, 35 Conn. 172. And see *Fuller v. Steiglitz*, 27 Ohio St. 355, 359; S. C., 22 Am. Rep. 312.

In England, the defense of set-off is founded on the statute of 2 Geo. 2, ch. 22, which was made perpetual by the statute of 8 Geo. 2, chap. 24. Under the provisions of these statutes, and of subsequent ones enacted in England and in this country, the defendant is now permitted, in cases of mutual debt, to set off his claim against the plaintiff's, by pleading it in bar. See 2 Chit. on Cont. (11th Am. ed.) 1267; *Meriwether v. Bird*, 9 Ga. 594. But it is not compulsory on the defendant to avail himself of his right of set-off; he may, if he please, satisfy the plaintiff the whole of his debt, and then resort to a cross-action to recover the money due from him. *Laing v. Chatham*, 1 Camp. 252; *De Sylva v. Henry*, 3 Port. (Ala.) 132; *Himes v. Barnitz*, 8 Watts, 39; *Minor v. Walter*, 17 Mass. 237. Or, if the set-off exceed the plaintiff's demand, an action will afterward lie for the surplus. *Hennell v. Fairlamb*, 3 Esp. 104. But, in such case, according to the prevailing practice in this country, the defendant would have judgment against the plaintiff for the surplus due on his set-off (*Cowsar v. Wade*, 2 Brev. [So. Car.] 291; *Avery v. Brown*, 31 Conn. 398); and the plaintiff would not be allowed to discontinue his action to avoid this. *Riley v. Carter*, 3 Humph. (Tenn.) 230.

There can be no set-off when the plaintiff has no cause of action (*Claridge v. Klett*, 15 Penn. St. 255); nor can there be a set-off against a set-off. *Gable v. Parry*, 13 Penn. St. 181; *Hudnall v. Scott*, 2 Ala. 569. Set-offs are allowed in order to prevent multiplicity of actions, and ought not to be allowed so as to be themselves the cause of new disputes. *Mangle v. Stiles*, 31 Penn. St. 72.

Since set-off belongs to the remedy, it is governed by the *lex fori*. *Savary v. Savary*, 3 Clarke (Iowa), 271. And statutes of set-off, being regarded as beneficial acts, tending to prevent circuity of action, and to settle controversies speedily, and with comparatively small expense, will be liberally construed. See *Temple v. Scott*, 3

Minn. 419; *Good v. Good*, 5 Watts, 116; *Chamboret v. Cagney*, 10 Abb. (N. S.) 31. The expressions "mutual debts," "dealing together," and "indebted to each other," in the statutes, are held to be of the same import. *Gordon v. Bowne*, 2 Johns. 150; *Pate v. Gray*, 1 Hempst. 155.

§ 2. **What demands a subject of set-off.** Demands, in order to be the subject of set-off, must be legal; and a claim which is in itself illegal cannot be the subject of a set-off. *Chicago, etc., Dock Co. v. Dunlap*, 32 Ill. 207. Thus, accounts founded on a gaming consideration are not allowed as set-off. *Payne v. Loudon*, 3 Bibb (Ky.), 250; *Caldwell v. Caldwell*, 2 Bush (Ky.), 446. And services rendered in behalf of the plaintiff which are a fraud upon a third person cannot be the subject of set-off. *Wyburd v. Stanton*, 4 Esp. 179. See, also, *Evernghim v. Ensworth*, 7 Wend. 326; *Callehan v. Stafford*, 18 La. Ann. 556; *Walker v. Hill*, 5 Hurl. & N. 419. But if part of a divisible demand be legal, and a part illegal, that which is legal may be set off accordingly. *Rice v. Welling*, 5 Wend. 595; *McCraney v. Allden*, 46 Barb. 272.

To entitle the defendant to maintain an account in set-off, it must be of such a character that the plaintiff will be protected by the record from another action on the same subject-matter. *Stevens v. Blen*, 39 Me. 420. But a set-off is an affirmative demand, and, however brought into court, cannot be investigated, upon the merits, unless prosecuted by the party who pleads it. Hence, if the defendant, in a suit upon a promissory note, pleads a set-off and afterward suffers judgment by default, such set-off cannot be considered as *res adjudicata*. It remains an independent claim, on which a separate subsequent action may be maintained. *Wright v. Salisbury*, 46 Mo. 26.

Since the purpose of a set-off is to avoid circuity of action, the person resorting to it must have either a legal or an equitable right to sue for the demand. *Carew v. Northrup*, 5 Ala. 367. He must in general, in point of fact, own and control it, so that his suing creditor is, as to that claim, his debtor (*McGraw v. Pettibone*, 10 Mich. 530; *Kimbrel v. Glover*, 13 Rich. [So. Car.] L. 191); and he is bound to prove the same facts in relation to the set-off as though he had brought his action upon it. *Kelly v. Garrett*, 1 Gilm. (Ill.) 649. A permission to the defendant to use a bill as a set-off, and to be liable to the owner only in the event of his being able to set it off, is not such a property in the bill as makes it the subject of set-off. *Adams v. M'Grew*, 2 Ala. 675. But it is held that by the words "good faith" all that the statute contemplates is, that the demands offered in

set-off shall be *actually* and not merely *colorably* owned by the defendant. *Smith v. Warner*, 16 Mich. 390. See *post*, p. 497, § 19.

It was held in early cases, in Georgia, that a court cannot take cognizance of a debt or demand in a plea of set-off, over which it could not entertain jurisdiction, if the defendant had instituted suit thereon in the same court (*Cash v. Cash*, Ga. Dec. [Part 1] 97; *Picquet v. Cormick*, Dudley [Ga.], 20), and that if such a set-off be pleaded in an inferior court, and allowed, and there be an appeal, the cause will come up subject to the same limitations. *Id.* And see *Orr v. Foot*, 2 Brev. (So. Car.) 379; *Wells v. Reynolds*, 3 *id.* 407. Generally, in a suit before a justice of the peace, the defendant may set off such items as do not exceed the justice's jurisdiction. *Holden v. Wiggins*, 3 Penr. & W. (Penn.) 469. See *Boone v. Boone*, 17 Serg. & R. 386; *McClain v. Kincaid*, 5 Yerg. (Tenn.) 232. Courts of admiralty are not invested by statute with any authority to hold plea of set-offs generally. Wherever they do entertain such claims it is upon general principles of equity, where the claims attach to the particular maritime demand submitted to their cognizance by the libel, and not upon any notion of a right to enforce such set-offs as are now recognized and enforced in courts of common law, under statutable provisions. *Bains v. Schooner James*, 1 Baldw. (C. C.) 544; *Willard v. Dorr*, 3 Mas. (C. C.) 161.

An award for the payment of money may be set off. *Burgess v. Tucker*, 5 Johns. 105. So, if the plaintiff, pending an arbitration, refuses to complete it, and brings an action, the defendant may set off the expenses of witnesses at the arbitration, and such other expenses as he might recover on the arbitration bond. *Curtis v. Barnes*, 30 Barb. 225. So, the defendant may set off, against the demand of the plaintiff, money which, before the commencement of the suit, he had been compelled to pay on suits instituted in his name by the plaintiff, without his consent. *Brazier v. Fortune*, 10 Ala. 516. But money paid upon a debt not due cannot be recovered back, and, therefore, cannot be pleaded to the debt, in reconvention, though it may be as payment. *Blair v. Reed*, 20 Tex. 310. So, in an action by one town against another, for supplies furnished to a pauper, the defendant town cannot file in set-off a demand against the plaintiff town for the support of paupers belonging to the latter. *Augusta v. Chelsea*, 47 Me. 367. A demand for the support or relief of paupers originates solely in positive provisions of the statute, and has in it none of the elements of a contract, express or implied. *Id.*

A person owing a balance upon an account, but having a greater sum due him for merchandise subsequently furnished, is not estopped

from pleading the latter as a set-off, by a promise to pay the former balance. Such promise is without consideration to support it, unless in consequence thereof the promisee has acted so as to alter his previous position, and the breach thereof would operate to his injury. *Hodgen v. Kief*, 63 Ill. 146. So, a verdict for the defendant in replevin and an expected judgment thereon, although assigned before the judgment was rendered, may be a proper subject of set-off, in an action to recover the original price of the property replevied. *Bonte v. Hall*, 2 Cin. (Ohio) 23; 1 Dis. 168.

So, a set-off, allowed by the laws of the State in which suit is brought, can be legally set up as a defense, although not allowed by the laws of the State where the contract which constitutes the cause of action was made. *Davis v. Morton*, 5 Bush (Ky.), 160.

But a party entitled to a right of set-off can be deprived of the legal right by an agreement deliberately made upon a good consideration. Like every other benefit or privilege conferred by law, it may be waived by the party entitled to it, under the general, well-settled doctrine that an individual may waive any statutory or constitutional provision intended for his benefit. *Gutchess v. Daniels*, 49 N. Y. (4 Sick.) 605.

§ 3. **What a set-off in an action at law.** Generally, statutes of set-off apply only where the debts between the parties are mutual *legal* debts, as contradistinguished from *equitable* debts. That is, a claim, to be set-off at law, must be a claim at law and not in equity. *Gilchrist v. Leonard*, 2 Bailey (So. Car), 135. But, in some of the States, as, for instance, in Wisconsin, an equitable claim may be set off in a suit at law. *Atwater v. Schenck*, 9 Wis. 160. So, in New Hampshire, equitable debts or demands are within the meaning of the statute. *Chandler v. Drew*, 6 N. H. 469. And see *Morgan v. North American Bank*, 8 Serg. & R. (Penn.) 73; *Wartman v. Yost*, 22 Gratt. (Va.) 595. In Alabama an equitable demand cannot be set off by a garnishee, in a court of law, against his indebtedness to the defendant. *Loftin v. Shackelford*, 17 Ala. 455. And it is laid down as a rule, that a claim is available in set-off at law, only when it is a debt on which the defendant could maintain an action at law against the plaintiff. *Weaver v. Rogers*, 44 N. H. 112. See, also, *Milburn v. Gayther*, 8 Gill (Md.), 92; *Smith v. Taylor*, 9 Ala. 633; *Ewing v. Griswold*, 43 Vt. 400; *Battle v. Thompson*, 65 No. Car. 406; *Mungum v. Ball*, 43 Miss. 288; S. C., 5 Am. Rep. 488.

It is held to be no objection to a plea of set-off, that the defendant has brought an action against the plaintiff for the same sum, even although the plaintiff has paid the money into court in such former

action. *Evans v. Prosser*, 3 Term R. 186; *Stroh v. Ulrich*, 1 Watts & Serg. (Penn.) 57; *Naylor v. Schenck*, 3 E. D. Smith (N. Y.), 135. But a debt cannot be pleaded as a set-off if there be, at the time, a suit pending against the plaintiff for the same debt in favor of one who was at the beginning of the suit the true owner of such set-off. *Whitaker v. Pope*, 48 Ga. 315.

§ 4. **What a set-off in a suit in equity.** Courts of equity were in possession of the doctrine of set-off, as grounded upon principles of equity, long before the law interfered. And a set-off was admitted in case of mutual dealings, where it appeared to have been the intention of the parties that one debt should be set against the other. *Ec parte Stephens*, 11 Ves. 27; *Astley v. Gurney*, L. R., 4 C. P. 714; *Greene v. Darling*, 5 Mas. (C. C.) 207; *Jeffries v. Evans*, 6 B. Monr. (Ky.) 119. And see *Howe Sewing Machine Co. v. Zachary*, 2 Tenn. Ch. 478. But if the debts were not connected chancery did not interfere. *Green v. Farmer*, 4 Burr, 2214. And courts of equity do not now act upon the subject of set-off in respect to distinct and unconnected debts unless some peculiar equity has intervened. *Simmons v. Williams*, 27 Ala. 507; *Beall v. Squires*, 3 T. B. Monr. (Ky.) 372, 375. The mere existence of distinct debts, without mutual credit, does not give a right of set-off in equity. *Greene v. Darling*, 5 Mas. (C. C.) 201; *Schermerhorn v. Anderson*, 2 Barb. 584; *Gordon v. Lewis*, 2 Sunn. (C. C.) 628; *Riddick v. Moore*, 65 No. Car. 332. But where cross-indebtedness arises out of mutual dealings, equity will always interpose to set off one debt against the other, and adjudge the balance to be the sum equitably due. *Schieffelin v. Hawkins*, 1 Daly (N. Y.), 289. Insolvency, ordinarily, affords a ground for set-off in equity. *Ainslie v. Boynton*, 2 Barb. 258; *Smith v. Felton*, 43 N. Y. (4 Hand) 419; *Hamilton v. Van Hook*, 26 Tex. 302; *Field v. Oliver*, 43 Mo. 200; *Brewer v. Norcross*, 17 N. J. Eq. 219; *Marshall v. Cooper*, 43 Md. 46. But not where the claim was bought subsequent to the insolvency, for the purpose of set-off. *Condon v. Shehan*, 46 Miss. 710; *Reppy v. Reppy*, 46 Mo. 571. A demand cannot be set off in equity any more than at law, unless it existed against the plaintiff in favor of the defendant, at the time of the commencement of the suit and had then become due. *Id.* But see *Smith v. Fox*, 48 N. Y. (3 Sick.) 674; *Davidson v. Alfaro*, 16 Hun (N. Y.), 353, 358.

In an early case, in Alabama, in which the doctrine of equitable set-off is fully considered, the general principles deduced from the English cases, then existing, are thus stated: 1. That, although courts of equity at first assumed jurisdiction on the natural equity, that one demand should compensate another, and that it was iniquitous to attempt, at

law, to enforce more than the balance, yet now they only exercise it when a legal demand is interposed to an equitable suit. 2. When an equitable demand cannot be enforced at law, and the other party is suing there. 3. Or where the demands are both purely legal, and the party seeking the benefit of the set-off can show some equitable ground for being protected. *Tuscumbia, etc., R. R. Co. v. Rhodes*, 8 Ala. 206, 220. And it is said that the same principles obtain in the American courts generally. *Id.* And see *Gay v. Gay*, 10 Paige, 369; *Clark v. Cort*, 1 Cr. & Ph. 154, and cases cited above.

Upon a mere question of offset under the statute, the principles of courts of equity and courts of law are the same. They put the same construction on the statutes of set off, in the absence of all intervening equities, as do the courts of law. *Cave v. Webb*, 22 Ala. 583; *Jordan v. Jordan*, 12 Ga. 77; *McKinley v. Winston*, 19 Ala. 301. And the ground of relief is the same in both courts, unless there are some peculiar circumstances, or natural equity, growing out of the mutual transactions or condition of the parties, which would require the interposition of a court of equity, and which a court of law could not regard. *Id.*; *Lockwood v. Beckwith*, 6 Mich. 168; *Elder v. Lasswell*, 2 Blackf. (Ind.) 349; *Black v. Whitall*, 9 N. J. Eq. 572; *Lee v. Lee*, 31 Ga. 26; *Simmons v. Williams*, 27 Ala. 507; *Raleigh v. Raleigh*, 35 Ill. 512.

Claims purely legal cannot be set off in equity, where there is no obstruction to the operation of due process of law against the party indebted. *Tribble v. Taul*, 7 T. B. Monr. (Ky.) 455. And if a party sued at law has a demand which he might set off, and neglects to do it, he cannot come into a court of equity and ask permission to make a different determination, and to be restored to the right he has voluntarily waived. *Hendrickson v. Hinckley*, 17 How. (U. S.) 443. But see *Hughes v. McCoun*, 3 Bibb (Ky.), 254. It is held in Virginia that one who fails to make a set-off at law cannot have relief in equity, although the omission is due to surprise or accident, unmixed with negligence, because he still has a legal remedy by suit. *Hudson v. Kline*, 9 Gratt. (Va.) 379.

But where it is doubtful whether a matter of set-off could have been established at law by the defendant in a judgment, there is held to be good ground for the interposition of equity after judgment. *French v. Garner*, 7 Port. (Ala.) 549. And see *Ward v. Chiles*, 3 J. J. Marsh. (Ky.) 486.

§ 5. **Demands barred by statute of limitations.** An account, barred by the statute of limitations, cannot be sustained as a set-off (*Turnbull v. Ströhecker*, 4 McCord [So. Car.], 210; *Gilchrist v. Williams*, 3 A. K. Marsh. [Ky.] 235); without evidence to take it out of

the statute. *Taylor v. Gould*, 57 Penn. St. 152. And if a debt so barred be pleaded in bar to the plaintiff's action, the plaintiff may reply the statute; or if such debt be given in evidence, on a notice of set-off, it may be objected to at the trial. See *ante*, tit. *Limitations*, p. 271. A demand barred by the statute of limitations, although afterward revived by a new promise, is no set-off to an action commenced during the time the demand was barred. *Lee v. Lee*, 31 Ga. 26. But if the subject-matter of a set-off is not barred at the commencement of the suit, and was then a debt due the defendant from the plaintiff, it will be good, although it may be barred at the time the answer is filed. *Crook v. M'Greal*, 3 Tex. 487. It was held in Massachusetts, in an action by the assignee of an insolvent debtor on a debt due to the insolvent, that debts due and payable from the insolvent more than six years before the commencement of the action, but less than six years before the commencement of the proceedings in insolvency, may be set off. *Parker v. Sanborn*, 7 Gray, 191.

§ 6. **Demand existing when suit commenced.** A claim in set-off, to be available, must be due and payable at the time of the commencement of the plaintiff's action (*Martin v. Kunsmüller*, 37 N. Y. [10 Tiff.] 396; *Toppan v. Jenness*, 21 N. H. 232; *Henry v. Butler*, 32 Conn. 140); it must have been at that time a subsisting cause of action in the defendant's favor (*Id.*; *Ryan v. Barger*, 16 Ill. 28; *Robinson v. Safford*, 57 Me. 163; *Bartlett v. Holmes*, 20 Eng. L. & Eq. 277); upon which an action might have been sustained. *Id.*; *Swift v. Fletcher*, 6 Minn. 550; *McDade v. Mead*, 18 Ala. 214. See *ante*, p. 477, § 3. And a demand can no more be set off in equity than at law, unless it existed against the plaintiff, in favor of the defendant, at the time of the commencement of the suit. *Reppy v. Reppy*, 46 Mo. 571.

The great purpose of the statute of set-off is to effect the liquidation of mutual debts without resorting to suits, not only by each, but by either party. It looks to the balance as the debt; and, therefore, if one of two persons having mutual dealings will sue the other, instead of exchanging discharges, the party sued is allowed to set off his debt against the other as a bar to the action. In other words, the plaintiff is made to pay the costs as a penalty for his wanton and obstinate litigation. But this is applicable only where upon the state of facts both debts existed at the time of suit brought. The plaintiff is culpable if he sues when there is really no debt due to him, and is justly subjected to the costs. But it is entirely the other way when the plaintiff becomes the defendant's debtor, after he brought his own suit. *Haughton v. Leary*, 3 Dev. & Bat. (No. Car.) L. 21. And see *Clarke v. Magruder*, 2 Har. & J. (Md.) 77; *Bishop v. Tucker*, 4 Rich. (So. Car.) 178; *Frazier*

v. *Gibson*, 7 Mo. 271. Thus, a note, which has not matured at the time of the commencement of the action, cannot be set-off, though it became due before plea pleaded. *Whitaker v. Turnbull*, 18 N. J. Law, 172. So, an award published after the commencement of the plaintiff's action is not a proper set-off, although the subject-matter of the submission was a claim subsisting at the date of the suit. *Varney v. Brewster*, 14 N. H. 49. Nor is a demand in the defendant's favor, accruing subsequent to the commencement of the suit from a liability incurred before, a legal set-off. *Houston v. Fellows*, 27 Vt. 634.

In an action by A against B for goods sold and delivered, B cannot set off an order for goods, drawn by C upon A, and accepted by A subsequent to the delivery of the goods sued for, although such order might be given in evidence under a plea of payment, or of the general issue, with other evidence connecting it with the goods sued for. *Davis v. McGrath*, 10 Penn. St. 170.

§ 7. **Unliquidated demands.** The general rule is incontrovertible, both at law and in equity, that unliquidated damages cannot be pleaded by way of set-off, unless there is some understanding between the parties, express or implied, under which the defense can be let in, or some special case made, such as the insolvency, non-residence, etc., of the plaintiff. *Bonaud v. Sorrel*, 21 Ga. 108. And see *DeForrest v. Oder*, 42 Ill. 500; *Ware v. United States*, 4 Wall. 617; *Montague v. Boston, etc., Iron Works*, 97 Mass. 402; *Evans v. Hall*, 1 Handy (Ohio), 434; *McCracken v. Elder*, 34 Penn. St. 239; *Casper v. Thigpen*, 48 Miss. 635; *Grimes v. Reese*, 30 Ga. 330; *Smith v. Washington Gas-light Co.*, 31 Md. 12; *Hall v. Glidden*, 39 Me. 445; *State v. Welsted*, 11 N. J. Law, 397; *Ricketson v. Richardson*, 19 Cal. 330; *Pike v. Wells*, 24 La. Ann. 208. And damages resulting from the breach of a contract are unliquidated, when there is no criterion provided by the parties or by the law, by which to ascertain the amount of the damages. *McCord v. Williams*, 2 Ala. 71. And see *Butts v. Collins*, 13 Wend. 156; *Smith v. Eddy*, 1 R. I. 476; *Hall v. Glidden*, 39 Me. 445. Thus, damages done by hogs to corn, the quantity of the corn, or its value per bushel, or in the gross, not having been fixed or agreed upon by the parties, cannot be set off, although the plaintiff promised to pay for the corn. *Robison v. Hibbs*, 48 Ill. 408. So, in an action on contract, it was held that "injury done to a piece of rye" was not a proper subject of set-off, although the defendant offered to prove that the plaintiff agreed to pay for all damages. *Corey v. Jones*, 15 Gray, 543. So where the defendant had sold a horse to the plaintiff, and had afterward taken it back under a promise from the plaintiff that he would pay for the use of the horse, and any damage it might have sustained while in his pos-

session, or leave it to a third person to determine, it was held that a claim for such use and damage, the same not having been determined by the third person named, was not the subject of set-off in an action between the parties for another cause. *Stevens v. Blen*, 39 Me. 420. So the damages to be recovered for a breach of a contract not to carry on a particular business in a certain place are uncertain, and must be liquidated in an action at law, before they can form a proper item of set-off in a suit in equity. *Collins v. Farquar*, 4 Litt. (Ky.) 153.

But the rule that unliquidated damages cannot be set off does not apply to money demands for which *indebitatus assumpsit* will lie. *Ragsdale v. Buford*, 3 Hayw. (Tenn.) 192. On the other hand, it is the general rule that, where *indebitatus assumpsit* will lie on a simple contract, the debt due thereon may be pleaded in set-off. *Littell v. Shockley*, 4 J. J. Marsh. (Ky.) 245; *Crenshaw v. Jackson*, 6 Ga. 509; *Austin v. Feland*, 8 Mo. 309; *Brazier v. Fortune*, 10 Ala. 516. See Vol. 1, p. 382. In general, demands ascertained or depending upon mere computation, may be set off. *Hanna v. Pleasants*, 2 Dana (Ky.), 269. In order to constitute a valid set-off, it is not necessary that a price should be agreed upon for an article sold and delivered. *Gunn v. Todd*, 21 Mo. 303. Thus, a demand for the value of corn delivered may be pleaded as an offset, though the price of the corn had not been agreed on. *Smith v. Huie*, 14 Ala. 201. See *Handley v. Dobson*, 7 Ala. 359; *Bolinger v. Gordon*, 11 Humph. (Tenn.) 61. But in an action for the recovery of money due on a promissory note, the defendant cannot, under the plea of set-off, give in evidence a writing by which the plaintiff promised to pay him "fifty barrels of corn," the value of the corn not having been determined, nor a criterion furnished by which it might be determined. *Handley v. Dobson*, 7 Ala. 359. So, a claim for services rendered for what they should be reasonably worth, is not a liquidated demand and subject of set-off. *Bell v. Ward*, 10 R. I. 503. And a claim growing out of a breach of covenant cannot be ordinarily liquidated by calculation, and is not the subject of set-off. *Gridley v. Tucker*, 1 Freem. (Miss.) Ch. 209; *Wright v. Smyth*, 4 Watts & Serg. 527; *Camp v. Douglas*, 10 Iowa, 586. See *post*, p. 491, § 14. But in an action for the purchase-money of land, damages arising from a breach of the covenants in a deed of land may be set off in cases where the amount of such damages can be ascertained by mere computation. *Drew v. Towle*, 27 N. H. 412.

No set-off is admissible in an action on an open policy of insurance, although the demand is for a total loss, as the damages are uncertain and unliquidated. *Gordon v. Bowne*, 2 Johns. 150. But if it be

stipulated in a policy of insurance that the premium shall be deducted out of any loss claimed, the court will set off the premium due against the amount of a partial loss determined by assessors. *Dodge v. Union Marine Ins. Co.*, 17 Mass. 471. See *post*, p. 507, § 24.

In general, statutes allowing set-offs to be introduced permit this only where the claim sued on would itself be a proper subject of set-off. *Dowd v. Faucett*, 4 Dev. (No. Car.) 92. Therefore, in an action on a special contract for the sale and delivery of certain chattels, to be paid for in sawed lumber, in which the alleged breach was a failure to deliver a portion of said chattels, it was held that the action being for unliquidated damages, no set-off could be allowed. *Smith v. Warner*, 14 Mich. 152.

But under the statutes of set-off in some of the States, unliquidated damages, growing out of contract, may be pleaded in set-off. See *Keyes v. Western Vt. Slate Co.*, 34 Vt. 81; *Speers v. Sterrett*, 29 Penn. St. 192; *Haynes v. Prothro*, 10 Rich. (So. Car.) L. 318; *Robinson v. L'Engle*, 13 Fla. 482. In Kansas, any cause of action arising from contract, whether it be for a liquidated demand, or for unliquidated damages, may constitute a set-off, and be pleaded as such in any action founded upon contract, whether such action be for a liquidated demand, or for unliquidated damages. *Stevens v. Able*, 15 Kans. 584; *Read v. Jeffries*, 16 id. 534. In Alabama, not only debts, but liquidated or unliquidated demands, not *sounding in damages merely*, are now the subject of set-off. And an unliquidated demand not sounding in damages merely, which is made the subject of set-off, is defined as one which, when the facts upon which it is based are established, the law is capable of measuring accurately by a pecuniary standard. *Eads v. Murphy*, 52 Ala. 520; *Sledge v. Swift*, 53 id. 110. If however the law does not fix the measure of damages, if they are committed to the judgment of the jury, dependent on the circumstances of the particular case, the demand sounds in damages merely, and is not available as a set-off. *Id.*; *Walker v. McCoy*, 34 id. 659. And see *Hunt v. Gilmore*, 59 Penn. St. 450.

§ 8. **Demands arising out of torts.** Damages arising from a tort are clearly not a subject of set-off, either at law or in equity. *Vose v. Philbrook*, 3 Story's C. C. 335; *Pulliam v. Owen*, 25 Ala. 492; *Hall's Appeal*, 40 Penn. St. 409; *Shelly v. Vanarsdoll*, 23 Ind. 543; *Harris v. Rivers*, 53 id. 216; *Schweizer v. Weiber*, 6 Rich. (So. Car.) 159. Thus, one trespass cannot be set off against another (*Shelly v. Vanarsdoll*, 23 Ind. 543; *Lovejoy v. Robinson*, 8 id. 399); and a claim arising out of tort cannot be set off against a demand arising out of contract. *Indianapolis, etc., R. R. Co.*

v. *Ballard*, 22 id. 448; *Dean v. Allen*, 8 Johns. 390. Nor can a tort be pleaded in set-off in an action for a tort. *Hart v. Davis*, 21 Tex. 411. But where securities in the hands of a creditor are wrongfully disposed of by him so that the debtor has a claim upon him for damages for their loss, such damages can be set off against the debt, *pro tanto*, in an action at law brought by the creditor for the recovery of the debt. *Bulkeley v. Welch*, 31 Conn. 339. And see *Ainsworth v. Bowen*, 9 Wis. 348. And, in Iowa, a claim sounding in tort may be pleaded in set-off. *Campbell v. Fox*, 11 Iowa, 318.

In replevin a set-off is not in general allowable. The defendant cannot avail himself of a set-off, because the demand is uncertain in its nature, and it is no justification of a tortious act that the plaintiff is indebted to the defendant. *Fairman v. Fluck*, 5 Watts (Penn.), 516. And damages to real property, though caused by willful carelessness, cannot be pleaded by way of set off, in an action on a contract for the payment of money. *Street v. Bryan*, 65 No. Car. 619. See, also, *Waugenheim v. Graham*, 39 Cal. 169.

But a claim for money paid for unlawful purchases of liquors sold in violation of the prohibitory liquor law may be set off against any lawful demands sued by the vendors. The statute providing that money so paid shall be deemed to have been received without consideration, and may be recovered back, the liability for the same is thereby put on the same footing as for any other money had and received. *Ræthke v. Philip Best Brewing Co.*, 33 Mich. 340. And in an action of assumpsit, in Vermont, the defendant, under a proper plea in set-off, may recover for the use of a carriage, including damages thereto by the plaintiff's negligence, under the contract of hire; such claim being "founded upon a contract express or implied" within the statute. *Thompson v. Congdon*, 43 Vt. 396. But, in general, unliquidated damages in tort are not a proper subject of set-off in assumpsit. *Hall v. Penny*, 13 Fla. 621. And the rule disallowing a tort as a set-off in assumpsit was applied in an action to recover for the boarding of stage horses which the defendant averred had been detained away from him by the plaintiff, contrary to an agreement to permit the defendant to have a certain use of them. *Hudson v. Nute*, 45 Vt. 66.

In an action for negligence and breach of duty the defendant cannot claim to set off his account for services. *Collins v. Groseclose*, 40 Ind. 414. But although a demand is founded in tort, yet if the case is one in which the injured party may waive the tort, and sue in assumpsit, he may set up his demand in set-off, in an action of contract. *Norden v. Jones*, 33 Wis. 600; S. C., 14 Am. Rep. 782. A demand made by the United States for the proceeds of Indian trust-bonds, con-

verted by persons who had illegally procured and sold them, and had afterward become wholly insolvent, is a demand arising upon an implied contract, or one which may be so treated by a waiver of the alleged fraud, in the conversion of the bonds. It is, therefore, the proper subject of set-off by the United States to a demand made by the general assignees in insolvency, of the parties who had thus converted the bonds for the price of certain property formerly belonging to the insolvents, and by their said general assignee sold to the United States. *Allen v. United States*, 17 Wall. 207.

§ 9. **Demands arising from different transactions.** In general, in an action of contract, a demand of the defendant against the plaintiff, not arising *ex contractu*, nor out of the transaction set forth in the complaint, and not connected with the subject of the action, cannot be availed of by way of set-off. *Kurtz v. McGuire*, 5 Duer (N. Y.), 660. But matters *ex contractu*, arising out of a different transaction from the one in suit, may be proved by way of set-off. And this was so held as to damages arising from the plaintiff's breach of a sealed contract, entirely disconnected with the note in suit, namely, covenanting that logs floated down a certain stream by the plaintiff should not injure the defendant's land. *Halfpenny v. Bell*, 82 Penn. St. 128. See, also, *Elmaker v. Franklin Fire Ins. Co.*, 6 Watts & Serg. 439. It was likewise held in Pennsylvania that a defendant may give in evidence, by way of set-off, acts of non-feasance or misfeasance by the plaintiff, where the acts are immediately connected with the plaintiff's cause of action, for the purpose of defeating, in whole or in part, the plaintiff's cause of action; but that such a defense can only be co-extensive with the plaintiff's demand. *Henion v. Morton*, 2 Ashm. (Penn.) 150. So, it was held in that State, that damages arising from a breach of warranty of goods sold may be set off in an action on a note given in a different transaction. *Phillips v. Lawrence*, 6 Watts & Serg. 150. And that the defendant in an action may set off the excess of interest taken of him by the plaintiff, in a transaction different from that on which the action is brought. *Thomas v. Shoemaker*, 6 id. 179.

In an action on an open policy of insurance it was held that the defendant may set off a promissory note drawn by the plaintiff in his favor. *Baltimore Ins. Co. v. McFaddon*, 4 Har. & J. (Md.) 31. So, in an action upon a bond conditioned for the performance of an award, the defendant may set off the promissory note of the plaintiff. *Burgess v. Tucker*, 5 Johns. 105. And in an action on an open account, a judgment may be pleaded as a set-off. *McMahan v. Crabtree*, 30 Ala. 470. But claims arising under separate and distinct covenants, in

an agreement under seal, cannot be set off against each other. *McQuaide v. Stewart*, 48 Penn. St. 198. And in an action on a promissory note the defendant cannot set off damages alleged to have been sustained by fraudulent practices of the plaintiff, in a transaction which does not appear to have any connection with the note in suit. *Pratt v. Menkens*, 18 Mo. 158. So, if under a contract for the purchase and sale of real and personal property the seller delivers the personal property to the purchaser, and fails to carry out the residue of the contract, but the contract is not rescinded, the seller cannot set off the value of the property delivered, in an action upon an independent debt from him to the purchaser. *Wheeler v. Parks*, 15 Gray, 527.

§ 10. **Mutuality of demands.** It is a general rule, that demands cannot be set off unless they are mutual, and between the parties to the action. *Goodwin v. Richardson*, 44 N. H. 125; *Isberg v. Bowden*, 8 Exch. 852; *Kinne v. New Haven*, 32 Conn. 210; *Ryan v. Barger*, 16 Ill. 28; *Haughton v. Leary*, 3 Dev. & B. (No. Car.) L. 21. There can be no set-off between claims where the debtor on one side is not the creditor on the other side, nominally or really. *Hendricks v. Toole*, 29 Mich. 340; *Driggs v. Rockwell*, 11 Wend. 504. A set-off arising out of affairs, in which not only the parties to the suit, but others are interested, cannot, therefore, be made available as a defense. *Durbon v. Kelley*, 22 Ind. 183; *Brown v. Warren*, 43 N. H. 430; *Adams v. Bradley*, 12 Mich. 346; *Wright v. Rogers*, 3 McLean (C. C.), 229; *Fletcher v. Dyche*, 2 Term R. 32.

§ 11. **Joint and separate demands.** In accordance with the general rule stated in the preceding section, it is held that a joint debt cannot be set off against a separate debt, nor a separate debt against a joint debt. *Wilson v. Keedy*, 8 Gill (Md.), 195; *Palmer v. Green*, 6 Conn. 14; *Jones v. Gilreath*, 6 Ired. (No. Car.) L. 338; *Turbeville v. Broach*, 5 Coldw. (Tenn.) 270; *Bridgham v. Tilleston*, 5 Allen, 371; *McDowell v. Tyson*, 14 Serg. & R. (Penn.) 300; *Howe v. Shepard*, 2 Sumn. (C. C.) 409. And joint and separate debts cannot be set off against each other in equity any more than at law. *Id.*; *Robertson v. Parks*, 3 Md. Ch. 65; *Dale v. Cook*, 4 Johns. Ch. 11; *Brewer v. Norcross*, 17 N. J. Eq. 219. Where, therefore, to a plea of set-off, the plaintiff replies that he is not indebted as in the plea alleged, he may under this replication avail himself of the objection, that the debt is due not from himself alone, but from a third party jointly with him. *Arnold v. Bainbrige*, 24 Eng. L. & Eq. 451. So, in an action by A against B, the defendant cannot plead a note executed by A and C jointly. *Blankenship v. Rogers*, 10 Ind. 333. So, in an action against several defendants upon a joint obligation, one of the defendants has

no right to claim, as a set-off, a note of the plaintiff, held by one of his co-defendants. *Stone v. McConnell*, 1 Duv. (Ky.) 54. So, in an action upon a contract, against two or more defendants, a claim in favor of one of the defendants cannot be pleaded by him as a set-off, without alleging that he is the principal in said contract, and that his co-defendants are sureties therein. *Harris v. Rivers*, 53 Ind. 216. And in an action by A, a judgment in favor of the defendant against A and B cannot be set off. *Snyder v. Spurr*, 33 Conn. 407. See, also, *Atkins v. Churchill*, 19 id. 394. In an action against several as joint debtors for money lent, one of the defendants pleaded, by way of set-off, a claim against the plaintiffs, in his separate capacity, for fraud, failure, and neglect to perform their duty to him as agents in the transaction of his private business, and it was held that the set-off could not be maintained. *Peabody v. Beach*, 6 Duer (N. Y.), 53. And see *Hook v. White*, 36 Cal. 299; *Lemon v. Stevenson*, 36 Ill. 49.

But an agreement by a plaintiff that a debt due one defendant shall go as a credit on his claim against both, is held to be a sufficient special cause for its allowance as a set-off. *Threlkeld v. Dobbins*, 45 Ga. 144. So, in an action on a bond, the defendant may set off a bond signed by the plaintiff and another, upon evidence that it was to be so applied; and the bond, coupled with such testimony, is admissible in evidence under a plea of set-off. *Perkins v. Hawkins*, 9 Gratt. (Va.) 649. See, also, *Smith v. Myler*, 22 Penn. St. 36. So, where A had a separate demand against B, who was insolvent, and B had a demand against A and C jointly, it was held that chancery might apply the former demand in satisfaction of the latter. *Pond v. Smith*, 4 Conn. 297. See, also, *Blake v. Langdon*, 19 Vt. 485; *Phelps v. Reeder*, 39 Ill. 172. And a joint note executed by the plaintiff and another, deceased, may be set off against the plaintiff's claim. *Wells v. Teall*, 5 Blackf. (Ind.) 306.

In Pennsylvania, one of two or more defendants may set off his individual claim against the plaintiff's joint claim. *Childerston v. Hammon*, 9 Serg. & R. 67; *Miller v. Bomberger*, 76 Penn. St. 78. So, in Kentucky (*Dunn v. West*, 5 B. Mour. [Ky.] 376); and so in Missouri. *Kent v. Rogers*, 24 Mo. 306. And under the Iowa statute the defendant may plead in set-off a claim arising on contract, which would constitute in his favor a cause of action against the plaintiff and others jointly bound with him. *Redman v. Malvin*, 23 Iowa, 296. So, in Alabama, defendants jointly and separately liable to satisfy the plaintiff's demand may set off a demand due by the plaintiff to one defendant alone. *Sledge v. Swift*, 53 Ala. 110.

It has been held, in an action to recover the amount of a promissory

note executed by the defendant, that the latter cannot set off the amount of a lien for the unpaid balance of the purchase-money on a tract of real property purchased and held by the plaintiff with full knowledge of such lien, which is due and owing from an insolvent former owner of such real property, on his purchase thereof from the defendant. *Brake v. King*, 54 Ind. 294.

So, it is held in Georgia, that when a note, which is the property of two, jointly, is payable to one only, or bearer, and is in suit in the name of the payee, neither a tort nor a contract by the other jointowner alone, is a subject-matter of set-off to the action, without some special equitable circumstance; and the mere fact that the plaintiff in the action is a citizen of another State is not such a circumstance. *Ingram v. Jordan*, 55 Ga. 356.

So, in an action against two obligors on a bond, claims of one of the defendants alone against the plaintiff, which accrued after the bond, and were not made operative as payments upon it, cannot be made available as offsets to the claim on the bond. *Van Middlesworth v. Van Middlesworth*, 32 Mich. 183.

But where the plaintiff has received a certain sum of money on the resale of property, to one-half of which, after making certain deductions, the defendant is justly entitled, the property having been purchased for the benefit of both parties, the defendant has a legal right to have the same set off against a claim of the plaintiff. *Pope v. McGee*, 33 N. J. Law, 271.

§ 12. **By, against or between partners.** As already seen in the preceding sections, a set-off is inadmissible in any suit, unless it is in the same right and between the same parties; therefore, the separate debt of one partner cannot be set off against a partnership debt (*Howard v. Warfield*, 4 Har. & M. [Md.] 21; *Collier v. Dyer*, 27 Ark. 478; *Harlow v. Rosser*, 28 Ga. 219; *Ross v. Pearson*, 21 Ala. 473; *Pinckney v. Keyler*, 4 E. D. Smith [N. Y.], 469; *Ward v. Newell*, 37 Tex. 261; *Meeker v. Thompson*, 43 Conn. 77); and an unsettled claim against a firm cannot be set off in an action by one of the partners for his individual debt, even though they arose out of the same transaction (*Miliken v. Gardner*, 37 Penn. St. 456; *Jackson v. Clymer*, 43 id. 79; *Mitchell v. Sellman*, 5 Md. 376); without special circumstances to avoid the want of mutuality. *West v. Kendrick*, 46 Ga. 526. See *Lewis v. Culbertson*, 11 Serg. & R. 48; *Meador v. Scott*, 4 Vt. 26; *Ingraham v. Foster*, 31 Ala. 123. And in a suit by the representatives of a deceased copartner for a demand created in his life-time against a member of another firm, a debt of one partnership to the other cannot be set off. *Reed v. Whitney*, 7 Gray, 533. So, in an action to recover a

debt due from the defendant to the plaintiff individually, the defendant cannot set off a debt due from the plaintiff to a firm in which they are both partners (*Houston v. Brown*, 23 Ark. 333; *Lanl v. Cowan*, 19 Ala. 297); and a demand accruing to the defendant under a contract with the plaintiff, which constitutes them partners *inter sese*, is not available as a set-off at law. *Scott v. Campbell*, 30 id. 728. Nor can a defendant plead by way of set-off, or cross-action, any matters growing out of an unsettled partnership transaction between himself, the plaintiff, and a third person. *Sample v. Griffith*, 5 Iowa, 376. But an equitable demand, accruing to one of several defendants, from a fraud perpetrated on him by the plaintiff in a former partnership between them, is available as a set-off in favor of such defendant, when the plaintiff files a bill for a settlement of a new partnership between them and others, and is shown to be insolvent. *Ingraham v. Foster*, 31 Ala. 123. And see *Second Nat. Bank v. Hemingway*, 1 Cine. (Ohio) 435. So, a balance due from one partner to another, upon a settlement of partnership transactions, is a good set-off, provided they have agreed on that balance. *Dana v. Barrett*, 3 J. J. Marsh. (Ky.) 6. So, in a suit by a surviving partner, to recover a debt due from the firm, the defendant may set off a debt due to him from the surviving partner alone (*Holbrook v. Lackey*, 13 Mete. [Mass.] 132; *Miller v. Receiver of Franklin Bank*, 1 Paige, 444); and in an action by a surviving partner for his individual claim, the defendant may set off a demand against the firm. *Waln v. Hewes*, 5 Serg. & R. (Penn.) 468. So, in a suit by a surviving partner, on an obligation for a debt belonging to the partnership, but in his own name, the defendant can set off a partnership claim held by him. *Masterson v. Goodlett*, 46 Tex. 402, 406. In an action against a surviving partner, a debt which became due from himself separately may be included. And when the survivor is held for his own separate debt, he may set off a debt due him as surviving partner. *Newberry v. Trowbridge*, 13 Mich. 263.

Where copartners are summoned as trustees in a trustee process, they may set off a claim due from the defendant to one of the partners. *Robinson v. Furbush*, 34 Me. 509. And in an action by a partnership, the defendant may set off the price of goods purchased by one of the firm, by showing an agreement that it should be credited to him on the books of the firm. *Hood v. Riley*, 15 N. J. Law, 127. And although a debt due to a partnership cannot be set off against a debt due by an individual partner of the firm, yet, if the goods furnished by the partnership were charged to the individual partner, and by him furnished to the plaintiff, the debt may be set off against the plaintiff's demand. *Lamb v. Brolaski*, 38 Mo. 51.

But where one of two partners has paid his private debt to the plaintiff with firm funds, the two partners cannot avail themselves of this payment in set-off, in the plaintiff's suit at law, to recover a debt due from the firm. *Weaver v. Rogers*, 44 N. H. 112.

In an action on a promissory note, made by the defendants in their firm name and for a partnership debt, they cannot offset an account against the plaintiff in favor of another firm, now owned by *one* of the defendants. *Wilson v. Runkel*, 38 Wis. 526. In an action by the receiver of a firm which was lessee, for goods sold by him on the premises by leave of the court, it was held that the landlord could not set off rent due him. *Singerly v. Fox*, 75 Penn. St. 112.

§ 13. **Demands relating to husband and wife.** A debt contracted by the wife when sole cannot be set off in an action brought by the husband alone, unless the husband, after the marriage, makes the debt his own by some promise to pay made in writing, in consideration of forbearance, or some other new consideration. *Wood v. Akers*, 2 Esp. 594.

So when husband and wife join in an action upon a promise made to the wife, neither a debt due by the wife after marriage, a debt due by the husband alone, nor a debt due by husband and wife jointly, can be pleaded as a set-off. *Morris v. Booth*, 8 Ala. 907. See, also, *Glazebrook v. Ragland*, 8 Gratt. (Va.) 332. And in an action by husband and wife, on a note to the wife when sole, the defendant cannot plead by way of set-off a sale of goods to the husband and wife, which is the husband's separate liability. *Smith v. Johnson*, 5 Harr. (Del.) 40. So where a husband is joined as a technical party, but the cause of action is stated only against the separate property of the wife, debts due from the plaintiff to the husband cannot be pleaded in set off. *Carpenter v. Leonard*, 5 Minn. 155. And see *Hubby v. Cumplin*, 22 Tex. 582. And a joint interest in husband and wife cannot be set off by a debt due from the husband. *Glazebrook v. Ragland*, 8 Gratt. (Va.) 332. In an action by husband and wife, to recover money received on a legacy, given to a wife for her sole use, a set-off of demands against the husband will not be allowed. *Jamison v. Brady*, 6 Serg. & R. 466; *Pierce v. Dustin*, 24 N. H. 417. So in a suit to recover rent due to the separate estate of a wife, a demand against her husband cannot be set-off, although he has been authorized by her to receive the rent without accounting, and although he had offered to allow a part of the claim against him toward the debt for rent. *Naglee v. Ingersoll*, 7 Penn. St. 185. But see *Ferguson v. Lothrop*, 15 Wend. 625.

A claim against a complainant by a married woman defendant for a liability as surety with other persons, belonging to such married woman

and others, cannot be set off against a mortgage given by her husband and herself to secure a debt of the husband on his property. *Hendricks v. Toole*, 29 Mich. 340. And a note of a husband for property bought at an administrator's sale is not a proper set-off against a distributive share of the wife. *Stewart v. Glenn*, 3 Heisk. (Tenn.) 581. And see *Fink v. Hake*, 6 Watts (Penn.), 131; *Flory v. Becker*, 2 Penn. St. 470. Under the statutes of Iowa, a husband has no common or joint interest in a right of action accruing to the wife on account of a tort inflicted against her. Hence, in an action against husband and wife jointly, they cannot set up, by way of set-off or cross demand, a claim against the plaintiff for a previous malicious prosecution of the wife, nor a claim for damages accruing to the husband for a malicious prosecution of his minor children or himself by the plaintiff. *Musselman v. Galigher*, 32 Iowa, 383.

But it is held that the defendant in an action, on an account for boarding his wife and taking care of her in sickness, may show that, during the time alleged, a benevolent society contributed clothing and groceries for her support, which were appropriated by the plaintiff to his own use. *Boardman v. Silver*, 100 Mass. 330.

And when suit is brought against husband and wife, on a note executed by the wife when sole, the husband may set off one-half of the amount paid by him before suit brought on a judgment which was recovered against the wife when sole, and the plaintiff, on a note executed by them jointly. *Johnson v. King*, 20 Ala. 270. But he cannot set off such a payment made by him after the institution of the suit. *Id.*

In an action brought by the original obligees of a bond to the use of a *feme* plaintiff and her husband, an account may be set off for medical services rendered her before her marriage. *Gary v. Johnson*, 72 No. Car. 68.

§ 14. **Demands relating to landlord and tenant.** It appears to be a settled rule of the English law that a tenant, when sued for rent, cannot set up a breach of the landlord's agreement to repair by way of preventing a recovery of the full amount agreed to be paid, unless there is a covenant in his lease enabling him to do so, but must resort to a cross action for redress (*Johnson v. Carre*, 1 Lev. 152; *Watts v. Coffin*, 11 Johns. 495; *Sickels v. Fort*, 15 Wend. 559); the rule being placed upon the ground that the expenses to which the tenant may have been put, by the landlord's breach of covenant, must be unliquidated damages, and consequently not a proper subject of set-off. *Weigall v. Waters*, 6 Term R. 488; *Clayton v. Kinaston*, 1 Ld. Raym. 419. And see *ante*, p. 481, § 7. It is, however, the established

doctrine in New York, that in assumpsit to recover the rent of demised premises, the tenant may avail himself of a breach of the landlord's agreement to repair by way of *recoupment*, though not as a set-off. *Whitbeck v. Skinner*, 7 Hill, 53; *Nichols v. Dusenbury*, 2 N. Y. (2 Comst.) 283. So, damages sustained by the tenant in consequence of false representations of the landlord as to the quantity and productiveness of the land may be recouped. *Avery v. Brown*, 31 Conn. 398. And it was held in Alabama, that damages on account of the lessor's misrepresentations as to the capacity or the condition of a mill on the leased premises may be set off in an action of covenant by the lessor for rent reserved. *Cage v. Phillips*, 38 Ala. 382. So, in distress for rent, it was held that taxes paid by the tenant may be set off (*Franciscus v. Reigart*, 4 Watts [Penn.], 98, 476. See, also, *Grossman v. Lauber*, 29 Ind. 618); and in replevin upon a distress for rent, the tenant may set off the damages accrued by the failure of the lessor to make repairs, according to his covenant. *Murray v. Pennington*, 3 Gratt. (Va.) 91. So, where a lessee has suffered damages by eviction, he may *recoup* such damages in an action at law for the rent. *Tone v. Brace*, 8 Paige, 597; S. C., 1 Clarke's Ch. (N. Y.) 503; *Mayor, etc., of New York v. Mabie*, 13 N. Y. (3 Kern.) 151.

In an action of assumpsit for use and occupation, it was held that a separate, independent claim for goods sold and labor performed was not admissible in set-off against the rent. *Gunn v. Scovil*, 5 Day (Conn.), 113. And it was held that damages for inconvenience suffered by the tenant from a nuisance which the landlord is not, by the terms of the contract, bound to remove, cannot be set up in an action for the rent. *McGlashan v. Tullmudge*, 37 Barb. 313.

So, if one goes upon the land of another, even with his knowledge and consent, but without any special agreement, and excavates a canal which is beneficial to the owner, not being employed or requested, however, so to do, and applies the clay so excavated to his own gain and profit, as in the manufacture of brick, he cannot recover from the owner the value of the labor of excavating the clay, and, therefore, could not set off such labor in an action by the owner for the use and occupation of the land. *Chicago, etc., Dock Co. v. Dunlap*, 32 Ill. 207.

In a proceeding under the landlord and tenant law in Louisiana, to expel a contumacious tenant, a claim by the defendant, in reconvention, for the value of buildings erected by the tenant, being not properly connected with the main action, is not admissible. *D'Armond v. Pullen*, 13 La. Ann. 137.

In an action by infants against a stepfather for the use and occupa-

tion of their lands, he may set-off necessities furnished by him for their maintenance and education, if the rents and profits were an inadequate compensation therefor. *Grossman v. Lauber*, 29 Ind. 618. So it is held that where a tenant in possession under a lease for years, purchases a judgment which is an incumbrance on the leasehold, not for profit, but to protect his possession, he may lawfully offset the amount which he paid for the same against the rent. *Thrall v. Omaha Hotel Co.*, 5 Neb. 295 ; S. C., 25 Am. Rep. 489.

§ 15. **Demands of mortgagor and mortgagee.** The proceedings to foreclose a mortgage are *in rem*, and not against the person of the debtor, and the principles of set-off do not apply. *Dolman v. Cook*, 14 N. J. Eq. 56 ; *Bird v. Davis*, id. 467 ; *Troup v. Haight*, 110 N. Y. Ch. (N. Y.) 239.

In a suit to foreclose a mortgage, the defendant was not allowed to set off against the mortgage debt unliquidated damages for breach of an agreement not connected with the mortgage debt, on the ground that the plaintiff had parted with some of his property, and had threatened to put the residue of it beyond the reach of the defendant. *Jennings v. Webster*, 8 Paige, 503. So, if a purchaser of land accept a deed with special warranty, and execute his bonds and mortgage for the purchase-money, he cannot, in a suit in equity, brought by an assignee of the mortgage to enforce its payment, claim to be allowed a deduction from the mortgage debt by reason of an outstanding incumbrance on the land within the warranty. *Timms v. Shannon*, 19 Md. 296. And when the holder of a mortgage dies, having appointed the mortgagor an executor of his will, and on a settlement of the separate account of such executor a balance is found due him from the estate, such balance cannot be set off in a suit to foreclose the mortgage against the amount due thereon. *Dolman v. Cook*, 14 N. J. Eq. 56. And damages for the breach of a subsequently made contract cannot be set off against the amount due upon a mortgage. *Long v. Long*, id. 462. Where a lessee was also mortgagee, it was held in a suit for rent, that he could not set off the mortgage interest. *Scott v. Fritz*, 51 Penn. St. 418. So, where a party gives his note, secured by mortgage, for property sold to him and warranted to be of a particular quality, and when the note becomes due, other parties, to prevent the foreclosure of the mortgage, take the note up and give their own in lieu of it, the latter cannot, in a suit against them, set off any damages to the maker of the first note, occasioned by a breach of the contract of warranty. *Zuckerman v. Solomon*, 73 Ill. 130.

But in a suit by a mortgagor against a mortgagee for goods sold, the latter may set off a bond which was secured by the mortgage, although

he has purchased the equity of redemption. *Cutler v. Warnick*, 6 N. J. Law, 190. And where there is a conveyance of land subject to a mortgage for which the grantor is personally liable, and the grantee agrees in the deed to pay the mortgage as a part of his purchase-money, the contract is not one of indemnity merely, but a contract to pay, which the grantor may enforce, without actual payment made by him; and in the event of the death of the grantee, the grantor may set it off in a suit brought by the legal representatives of the grantee upon a contract for the payment of money. *Rawson v. Copland*, 2 Sandf. Ch. 251; S. C. affirmed, 3 Barb. Ch. 166.

Where an action is brought by the mortgagee of personal property to foreclose the mortgage and recover a judgment for the debt, subsequent purchasers of the goods cannot set up a demand in favor of the mortgagor against the mortgagee. *Beers v. Waterbury*, 8 Bosw. (N. Y.) 396.

It has been held in Minnesota that if a mortgage be given for the purchase-money of land, and an action be brought to foreclose it, damages for the breach of the covenant of seizin may be set up. *Lowry v. Hurd*, 7 Minn. 356. And under the statute of Iowa, in an action to foreclose a mortgage, the defendant may plead in set-off an account against a firm of which the plaintiff is a member. *Allen v. Muddow*, 40 Iowa, 124.

§ 16. **Demands of principal and agent.** Claims against an agent cannot be offset against a debt due the principal. *Atkinson v. Teasdale*, 1 Bay (So. Car.), 299; *Wilson v. Codman*, 3 Cranch, 193. And as a general rule, a principal cannot set off a debt due to him from his own broker against the demand of one with whom he has contracted for the purchase of goods through the medium of the broker. *Dunn v. Wright*, 51 Barb. 244. And see *Winchester v. Hackley*, 2 Cranch, 342. So, compensating a debt due by an agent for moneys collected by him in the performance of his duties, by a debt due by the principal to said agent, is not allowable. *City of New Orleans v. Finnerty*, 27 La. Ann. 681; 21 Am. Rep. 569.

Where an agent is liable on a contract made for the benefit of a third person, by reason of not disclosing his agency, he cannot avail himself of a debt due by the plaintiff to such third person as a set-off. *Forney v. Shipp*, 4 Jones' (No. Car.) Law, 527. On the other hand, a principal when sued cannot avail himself of a claim due by the plaintiff to his agent, who transacted the business. Thus, the maker of a note, who put it into the hands of a broker for sale or advances, when sued by one who has advanced money upon it, cannot set off a debt due from the plaintiff to the broker. *Carman v. Garrison*, 13 Penn. St. 158.

To an action arising on the contract of the agent, the purchaser may, however, in general set off a debt due by the agent to himself; but not where he has notice of the agency before his responsibility for the agent actually accrues. *Conyers v. Magrath*, 4 McCord (So. Car.), 392. And where an insurance was effected by an agent, for the benefit of whom it concerned, and the agent brought an action on the policy, in his own name, against the underwriters, for the benefit of the owners of the ship, it was held that the underwriters could not set off debts or demands due from the agent, in his own right, against the amount claimed for the loss. *Hurlburt v. Pacific Ins. Co.*, 2 Sumn. (C. C.) 471.

So it is held that where a stock-broker, without disclosing his principal, or the fact that he acts as broker, contracts to purchase stock, and deposits with the other party to the contract, merely as security for its performance, money which he received from his principal for the purpose, such contracting party, not having parted with any thing on the faith of the deposit, cannot, when sued by the principal to recover back the deposit, set off a debt due to him from the broker. *White v. Jaudon*, 9 Bosw. (N. Y.) 415.

If an agent in collecting a note receives an over-payment without being aware of the mistake, and in good faith pays the money over to his principal, and the agent was the owner of another note against the same party, obtained in good faith, and before the over-payment, the latter cannot, after the note becomes due, claim to set off against it the over-payment. *Granger v. Hathaway*, 17 Mich. 500.

It has been held that there is nothing in the doctrine of agency which forbids an attorney when sued for money collected by him for the plaintiff to set off a note held by him, executed by the plaintiff. *Noble v. Leary*, 37 Ind. 186.

§ 17. **Demands of principal and surety.** It has been held that, in an action against a principal and his sureties, a debt due from the plaintiff to the principal cannot be set off (*Woodruff v. State*, 7 Ark. 333; *Dart v. Sherwood*, 7 Wis. 523), unless by the consent of the principal. *Lynch v. Bragg*, 13 Ala. 773. On the other hand, it is held that, in an action upon a promissory note against principal and surety, a demand due from the plaintiff to the principal may be set off. *Mahurin v. Pearson*, 8 N. H. 539. And so, in debt on bond against principal and sureties, a debt due from the plaintiff to the principal may be set off (*Concord v. Pillsbury*, 33 N. H. 310); so, likewise, it is held that the note of a principal and his surety may be set off against a note of such principal alone. *Andrews v. Varrell*, 46 id. 17. In an action against principal and surety, on a jail bond, a separate demand of the principal may be pleaded in set-off. *Brundridge v.*

Whitecomb, 1 D. Chip. (Vt.) 180. And it was held that the defendants, principal and surety on a bond given by them to executors, might set off work done by one of them for the testator. *Crist v. Brindle*, 2 Rawle (Penn.), 121. In Indiana, the sureties on the bond of a guardian, in a suit upon the bond, may plead by way of set-off an indebtedness of the relator to the guardian. *Myers v. State*, 45 Ind. 160. So, in New York, in an action upon a promissory note signed by two persons, one as principal, and the other as surety, a set-off of an indebtedness from the plaintiff to the principal may be allowed. *Newell v. Salmons*, 22 Barb. 647. And see *post*, p. 530, Art. 3.

But a defendant will not be allowed to set off a debt against the plaintiff, as surety, where he has received ample security for the debt from the principal debtor. *Holden v. Gilbert*, 7 Paige, 208. And a surety cannot set off a demand which his principal would not be entitled to set off. *Gentry v. Jones*, 6 J. J. Marsh. (Ky.) 148. A surety, who pays the debt after the commencement of an action against him by the principal, cannot set off that payment in such action. *Cox v. Cooper*, 3 Ala. 256. But if a principal brings an action against his surety on a money demand, the surety may set up in defense the fact of the recovery against him of a judgment on his contract of suretyship. *Hannay v. Pell*, 3 E. D. Smith (N. Y.), 432. And money paid by B, as surety for A, is a good set-off against a note payable to A, which was indorsed after it fell due. *Harrington v. Wilcox*, 8 Jones' (N. C.) Law, 349. If a surety for a debt pays the same before it is due, the payment will, after the debt has become due, but not before, be a legal set-off against his note payable to the principal and held by him. *Jackson v. Adamson*, 7 Blackf. (Ind.) 597.

In an action upon the bond of executors, against the principals and sureties, alleging breaches in various acts of misconduct by the principals, the damages to be recovered are not necessarily liquidated, and the action is not, therefore, one in which a set-off is allowed. *State v. Modrell*, 15 Mo. 421. So, it is held that sureties for the payment by a lessee of his rent, cannot, in defense of an action brought against them for rent due from the lessee, avail themselves of a claim in set-off which has accrued to the lessee. *La Farge v. Halsey*, 1 Bosw. (N. Y.) 171. And see *ante*, p. 491, § 14.

In an early case in South Carolina, the defendant offered, as a set-off, that he had signed a note as surety for the plaintiff's estate, and had paid it since his death, and this was held to be a case on mutual credit, which might be set off under the statute. *Hinds v. David*, Harp. (So. Car.) 423. So, in Georgia, where a suit was instituted on a joint and several note against A as principal debtor and B as surety, and these

relations of the defendants appeared on the face of the record, it was held that A might set off an open account which he separately held against the plaintiff. *Harrison v. Henderson*, 4 Ga. 198. See *ante*, p. 486, § 11.

§ 18. **Demands by and against assignors.** The statutes of the different States vary considerably as to when a set-off may be allowed in cases of assignment, and the statute of the particular State should be consulted, in connection with the decisions of the courts made thereunder. It is, however, stated as a general doctrine, that where mutual demands exist between the parties, one of them cannot, by an assignment of his cause of action, defeat the right of the other to set off the judgments rendered thereon. *Hooper v. Brundage*, 22 Me. 460. But it is held that the assignment of a non-negotiable demand, arising on contract, before due, defeats a set-off by the debtor of an independent cross demand, on which no right of action had accrued at the time of the assignment. *Fuller v. Steiglitz*, 27 Ohio St. 355; S. C., 22 Am. Rep. 312.

Where a debt, on which a suit is brought, is absolutely assigned to a third person, pending the suit, and before a liquidation of the demand by a decree, the defendant cannot, on motion, set off a debt which has no connection with such demand. *Gay v. Gay*, 10 Paige, 369.

Debts nominally due between the same persons cannot be set off in equity, if, by assignment or otherwise, the real interest is different. *Cotton v. Evans*, 1 Dev. & Bat. (No. Car.) Eq. 284.

§ 19. **Demands by or against assignees.** It is no objection to a set-off, that it was not originally due to the defendant, but had been assigned to him, the assignment being made before the commencement of the suit. *Martin v. Williams*, 17 Johns. 330. Thus, a defendant may set off a note made by the plaintiff to a third person and assigned to the defendant before the commencement of the suit. *Farr v. Hemingway*, 3 Brev. (So. Car.) 549; *Hurd v. Earl*, 4 Blackf. (Ind.) 184; *Johnson v. Comstock*, 6 Hill, 10; *Bishop v. Tucker*, 4 Rich. (So. Car.) 178; *Whittaker v. Turnbull*, 18 N. J. Law, 172. So, a bond, executed by the plaintiff and assigned to the defendant by the obligee, before the commencement of the action, may be set off. *Tuttle v. Bebee*, 8 Johns. 152; *Russell v. Lithgow*, 1 Bay (So. Car.), 437. And a demand assigned to the defendant before the commencement of the suit may be set off, though he has not paid for it, but only agreed to pay. *Everit v. Strong*, 7 Hill, 585. So, the defendant may set off a bond given by the plaintiff to a third person, and by him informally assigned to the defendant. *Murray v. Williamson*, 3 Binn. (Penn.) 135. But it is held that the holder of a non-negotiable promissory note, transferred to

him by delivery merely, cannot plead the same in set-off in an action against him by the maker. *Ayres v. McConnel*, 15 Ill. 230. But see *Hickerson v. McFaddin*, 1 Swan (Tenn.), 258. And a party holding a chose in action, assigned to him conditionally, has no right to set it off. *McDade v. Mead*, 18 Ala. 214; *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59; *Shryock v. Basehore*, 82 Penn. St. 159; *McDonald v. Harrison*, 12 Mo. 447; *Arnold v. Johnston*, 28 How. (N. Y.) 249. So, it is to be observed that, in order to render a demand available as a set-off, the defendant must be entitled to a subsisting legal right of action on it, acquired before the commencement of the suit. *Speers v. Sterrett*, 29 Penn. St. 192, and cases above cited. And unliquidated and disputed claims against the plaintiff, purchased by the defendant after suit commenced against him, ought not, even in equity, to be allowed in set-off. *Dangerfield v. Rootes*, 1 Munf. (Va.) 529. And see *Riddick v. Moore*, 65 No. Car. 382.

But it is held that an overdue negotiable note, indorsed to a defendant before suit was commenced against him, may be the subject of set-off, although the plaintiff had no notice when he brought his suit, that the defendant held the note. *Cook v. Mills*, 5 Allen, 36.

The assignment of a chose in action is inoperative at law, and gives to the assignee no legal title whatever to maintain a suit; and any suit, to enforce it, must be in the name of the assignor, who still retains the legal ownership. See Vol. I, tit. *Assignment*. In case of such assignment, where the suit must be in the name of the assignor, the assignee, it is said, is usually, under statutes of set-off, subject to all such equities as existed between the original parties until the assignment and notice thereof to the debtor. *Id.*; *Oliver v. Lowrey*, 2 Harr. (Del.) 467; *Robinson v. Swigart*, 13 Ark. 71; *Wells v. Teall*, 5 Blackf. (Ind.) 306; *Mead v. Gillett*, 19 Wend. 397; *Soloman v. Holt*, 3 E. D. Smith (N. Y.), 139; *Newman v. Crocker*, 1 Bay (So. Car.), 246; *Hall v. Hickman*, 2 Del. Ch. 318; *Hackett v. Connett*, 2 Edw. Ch. (N. Y.) 73. Where a suit at law is brought upon a bond, by one to whom it has been assigned, the defendant may plead as a set-off any matter within the statute of set-off, and the assignee is subject to it; and if the plaintiff seek to enforce the bond by a suit in equity, the defendant has the same right to set-off, and the court will administer the statute as it would be done at law. *Bell v. Ward*, 10 R. I. 503. And see *Irving v. De Kay*, 10 Paige, 319; *Cavendish v. Greaves*, 24 Beav. 163; *Clark v. Cort*, 1 Cr. & Ph. 154. But to be the subject of set-off at law, the statute requires that the demand proposed to be set off should be liquidated, or be ascertainable by calculation. See *ante*, p. 481, § 7. And in an action upon a liquidated demand, held by the plaintiff as

assignee, an unliquidated claim for damages for breach of contract, existing in favor of the defendant against the assignor at the time of the assignment, is not a proper set-off. *Frick v. White*, 57 N. Y. (12 Sick.) 103.

A claim, on which an action at law might have been sustained, cannot be used as a set-off in equity against an assignee of another legal claim. *Hutchins v. Hope*, 7 Gill (Md.), 119. And to make a claim against an assignor available as a set-off in an action brought by the assignee, it must appear to be a demand against the assignor at or before assignment, and belonging to the defendant at that time. *Martine v. Willis*, 2 E. D. Smith (N. Y.), 524. See, also, *Eldred v. Hazlett*, 33 Penn. St. 307; *Northern Bank v. Kyle*, 7 How. (Miss.) 360; *Warner v. Whittaker*, 6 Mich. 133. And where a suit is brought upon an account, by the assignees thereof, in the name of the assignor, a promissory note of the assignor, held by the defendant at the time of the assignment of the account, but not then due, cannot be set off against such account. *Graham v. Tilford*, 1 Metc. (Ky.) 112; *Wells v. Stewart*, 3 Barb. 40. And the removal of an assignor from the State gives no right to an obligor of a bond to set off demands which he had against the assignor, against the assignee, without showing a connection between them and the replevin bond, while the assignor owned it. *Talbot v. Warfield*, 3 J. J. Marsh. (Ky.) 83. So, the insolvency of the obligee of a note taking place after he has made an assignment of the note, and the obligor has notice of the assignment, will not entitle the latter to set off his demand against the obligee in a suit on the note by the assignee. *Wathen v. Chamberlin*, 8 Dana (Ky.), 164. But the insolvency of an assignor, at the date of the assignment of a note, is a good ground in equity to authorize the obligor in the note to set off demands which he held on the assignor, due by note before the assignment, acquired by purchase. *Colyer v. Craig*, 11 B. Monr. (Ky.) 73.

Where the payee of a note agrees that any note of his that the maker may obtain shall be a good set-off, a note against the payee though not indorsed, if obtained by the defendant before notice that his note had been transferred, will be a good set-off against it when sued for the use of another. *Gary v. James*, 7 Fla. 640.

If a note, not negotiable, be assigned for a valuable consideration, and an action is brought thereon for the benefit of the assignee, in the name of the payee, the maker may set off a debt due to him at the time of the assignment (*Sanborn v. Little*, 3 N. H. 539); but it is otherwise, in such case, if the maker has promised the assignee to pay him the

amount of the note. *Wiggin v. Damrell*, 4 id. 69. And see *Gould v. Chase*, 16 Johns. 226.

In Indiana, in an action on a note by the assignee against the maker, the defendant may set off any matter which he might have set off in an action by the assignor, if it accrued to him before notice of the assignment (*Wells v. Teall*, 5 Blackf. [Ind.] 306); but a debt due from the payee to one of the defendants in such an action, or from the payee and another person to the defendants before the assignment, is not a good matter of set-off. *Woods v. Harris*, 5 id. 585; *Griffin v. Cox*, 30 Ind. 242. It is, however, held that, in an action by an assignee of a note, not payable in bank, the defendant may set off a joint note made by the payees of the note in suit, as principal for his individual debt, and by another as his surety, and held by the defendant as assignee thereof, before notice of the assignment of the note in suit. *Hoffman v. Zollinger*, 39 id. 461. See *Russell v. Redding*, 50 Fla. 448.

In an action by the assignee of a bond, the defendant may set off a contract for the sale of lands between himself and the obligee. *Mann v. Dungan*, 11 Serg. & R. (Penn.) 75. And it is held that the assignee of an open account against his creditor may use it as a set-off of any action commenced against him after the assignment. *Casper v. Thigpen*, 48 Miss. 635.

§ 20. **Demands as to assignee of insolvents, etc.** Promissory notes purchased after a voluntary assignment, made by an insolvent, for the benefit of his creditors, cannot be set off in an action brought in the name of the insolvent by the assignees, and it is immaterial whether the notes were or were not overdue. *Johnson v. Bloodgood*, 1 Johns. Cas. 51; *Hegerman v. Hyslop*, Anth. (N. Y.) 269. And in general, debts purchased with knowledge of the debtor's insolvency, or with reason to believe that he is about to go or be driven into insolvency, and notice to the debtor of the purchase, cannot be set off in an action by the assignee in insolvency, upon a debt due from the purchaser to the debtor. *Smith v. Hill*, 8 Gray, 572; *Long v. Penna. Ins. Co.*, 6 Penn. St. 421.

So, a creditor of an insolvent debtor, in an action against him by the debtor's agent for goods sold to him, cannot set off a debt due to him from such debtor. *Boinod v. Pelosi*, 2 Dall. (Penn.) 43. And an auctioneer, in whose hands the assignee of an insolvent debtor has placed goods for sale, cannot set off against the claim by the assignee for the proceeds, a debt due himself from the insolvent. *Henriques v. Hone*, 2 Edw. Ch. (N. Y.) 120. And in the case of an assignment by a debtor of all his property, to be sold by the assignees for the payment of his

debts, it was held that his creditors could not offset their demands, in payment of articles purchased by them at the public sale of the goods by the assignees. *Bateman v. Connor*, 6 N. J. Law, 104. And in an action by the assignee of a debtor for the benefit of creditors, against a creditor, for the conversion of certain notes left with him, by the debtor, as collateral security for a specific debt, the defendant cannot set off the debtor's general indebtedness. *Lane v. Bailey*, 47 Barb. 395.

It is well settled in Pennsylvania by numerous decisions, that a voluntary assignee is the mere representative of the debtor, enjoying his rights only and no others, and is bound only where the debtor would be bound. He is not the representative of the creditors, and is not clothed with their powers; he is but a volunteer and not a *bona fide* purchaser for value. *Matter of Fulton's estate*, 51 Penn. St. 204. Therefore, in an action by an assignee under a voluntary assignment for the benefit of creditors, upon a debt falling due after the assignment, the defendant may set off a debt due from the assignor at the time of the assignment. Thus, a bank made an assignment for the benefit of creditors, holding at the time the defendant's note, which it had discounted, and which was not due. It was also indebted to the defendant for deposits in a sum greater than the note. In an action on the note after its maturity, by the assignee, it was held that the defendant could offset the indebtedness to him. *Jordan v. Sharlock*, 84 Penn. St. 366; S. C., 24 Am. Rep. 198.

So, in New York, the principle that an assignee of a demand takes it subject to all equities which existed at the time of such assignment between the original parties to it, has been repeatedly applied to assignees of insolvent debtors, and receivers of insolvent corporations, who have been compelled to allow, by way of set-off, demands in favor of the debtors, existing at the time of the failure, against such bankrupts, individuals or corporations. Thus, where one, who had given his bond and mortgage to a savings bank, was also a depositor therein, and the bank became insolvent and a receiver was appointed, it was held that the mortgagor was entitled to a credit on his bond of the amount of his deposit at the time of the failure of the bank. *New Amsterdam Savings Bank v. Tartter*, 4 Abb. New Cas. (N. Y.) 215; S. C., 54 How. 385. So, a private banker, becoming insolvent, made a general assignment of his property, and directed his assignee to pay the debts in the same order and manner in which debts were required to be paid under the provisions of the bankrupt law. And it was held that a customer, who had money on a deposit with such banker, was entitled to set off the amount of his deposit against promissory notes

made by him and held by the banker. *Fort v. McCully*, 59 Barb. 87 See, also, *Finnell v. Nesbit*, 16 B. Monr. (Ky.) 351.

But it is held in Connecticut that upon the insolvency of a savings bank a depositor cannot set off his deposit against a debt due from him to the bank. *Osborn v. Byrne*, 43 Conn. 155; S. C., 21 Am. Rep. 641. Though it seems that, if the deposit was made for the purpose of applying the same in payment of the indebtedness to that amount, and the officers of the bank had knowledge of such purpose, then set-off may be allowed. *Id.*

In an action by the assignee of a bankrupt partner, a debt due to the defendant from the partnership may be set off. *Bean v. Cabbaness*, 6 Ala. 343. And it was held that the amount of a partnership deposit with an insolvent banker was a proper subject of set-off in an action brought by the assignee, in trust for creditors of such banker, on a note held by the banker, made by one of the partners and indorsed by the other for partnership purposes, although such note was not due at the time of the assignment. *Smith v. Felton*, 43 N. Y. (4 Hand) 419.

Where a party procured his own note to be discounted at a bank, and the money received was placed in the bank as a deposit to his credit, and he afterward became insolvent before the maturity of the note, it was held that the bank might be entitled to an equitable set-off of its debt against the deposit, as against the depositor, but not as against the rights of third parties, holders of the depositor's checks, presented for payment. *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398.

In Louisiana, in case of insolvency, compensation cannot take place if the debtor of the insolvent acquires the claim proposed to be compensated, after the failure of the insolvent. *Case v. Cannon*, 23 La. Ann. 112.

In an action by the assignees of a bankrupt to recover the price of machinery supplied by the bankrupt, the court allowed the defendant to plead an equitable plea of set-off for unliquidated damages, arising out of the same contract. *Wakeham v. Crow*, 16 C. B. (N. S.) 847.

§ 21. **Demands by executors, administrators, etc.** In an action against a defendant in his own right, he cannot set off a debt due to him as administrator (*Thomas v. Hopper*, 5 Ala. 442), unless he has been charged with the debt on final settlement, had in the court of probate, before the issue of the writ. *White v. Word*, 22 id. 442. And a debt due to an administrator, in his private capacity, cannot be set off against the share of a distributee of the estate. *Bradshaw's Appeal*, 3 Grant's (Penn.) Cas. 109; *Richbourg v. Richbourg*, 1 Harp. (So. Car.) Ch. 168. It is the duty of an executor or administrator to

settle the estate, pay the debts and distribute the surplus, and not to speculate in demands against creditors. He cannot, therefore, set off a debt purchased by him since the death of the testator or intestate, against a demand due by the estate of the deceased, or accruing in the life-time of the deceased. *Dudley v. Griswold*, 2 Bradf. (N. Y.) 24. It is not a legitimate purpose for which to employ the trust funds to buy up debts against claimants, and if he does so, he must take the risk of such dealings upon his own individual responsibility. *Mead v. Merritt*, 2 Paige, 402.

But where notes were taken running to "the estate" of a deceased person, they were held to be a fair subject of set-off against a legacy given to the promisor. *Wilson v. Edmonds*, 24 N. H. 517. And in an action by a legatee against the executor, to recover the residue of the legacy, the defendant may set off a certificate of a balance found due him in a former suit against him to recover a part of the same legacy. *Galloney's Appeal*, 6 Penn. St. 37. And see *Strong v. Bass*, 35 id. 333. So in an action against an administrator, an order drawn by the plaintiff on the intestate in favor of a third person, and found with the intestate's papers, not being rebutted by other evidence, will entitle the defendant to a deduction *pro tanto*. *Nehbe v. Price*, 2 Nott & McC. (So. Car.) 328. So in an action against the executor of his deceased partner, he may set off a debt due from the plaintiff to the partnership. *Burke v. Stillwell*, 23 Ark. 294.

And it has been held that a demand which an administrator has against one of the distributees of the estate, for the conversion of personal property of the estate, is a good subject of set-off by him in a suit in equity, brought by the distributees against him for a settlement of the estate (*Pearson v. Darrington*, 32 Ala. 227); but not against one who, having released the administrator from all pecuniary demands, is only entitled to a distributive share of the personalty *in specie*. *Id.*

In an action against an executor to recover rents collected, by his testator, as agent of the plaintiff, a set-off was allowed to the extent of one-half of the fees paid by the deceased to counsel employed to defend an action in which he and the plaintiff were joint defendants. *Percy v. Clary*, 32 Md. 245.

But an executrix was not permitted to set off damages for harassment and attorney's fees paid against a claim prosecuted against the estate she represented. *House v. Collins*, 42 Tex. 487. And it is held that, in an action against an administrator for a debt due from his intestate, the defendant cannot set off a sum due on a note given by the plaintiff to him as administrator for goods of his intestate which he had sold as administrator. *Smith v. Edwards*, 1 Houst. (Del.) 427.

§ 22. **Demands against executors, etc.** In the construction and application of the early English statutes of set-off, it was held that if an executor or administrator brought suit upon a debt created against the defendant after the death of the testator or intestate, or upon a debt whereon the cause of action arose after that event, the defendant could not set off a debt which existed and on which there was a cause of action against the testator or the intestate in his life-time. *Shipman v. Thompson*, Willes, 103; *Tegetmeyer v. Lumley*, id. 264, note; *Watts v. Rees*, 9 Exch. 696; S. C. affirmed, 11 id. 410. And the decisions of the English courts, under those statutes, are held to give a good rule for judicial action under similar statutes in this country. See *Gordon v. Bowne*, 2 Johns. 150; *Root v. Taylor*, 20 id. 137. It was held accordingly, that a debt created to executors after the death of their testator was not liable to a set-off of a debt due to the defendant from the testator in his life-time (*Dale v. Cooke*, 4 Johns. Ch. 13); and upon an application of the principle of the rule to an analogous state of facts, it was held that in a suit by an administrator the defendant could not set off a debt existing against the intestate in his life-time which the defendant had bought since the intestate's death. *Root v. Taylor*, 20 Johns. 137. See, also, *Jordan v. Nat. Shoe, etc., Bank*, 12 Hun (N. Y.), 512; *Shaw v. Gookin*, 7 N. H. 16; *Cook v. Lovell*, 11 Iowa, 81; *Wolfersberger v. Bucher*, 10 Serg. & R. 10; *Burton v. Chinn*, Hard. (Ky.) 260; *Bizzell v. Stone*, 12 Ark. 378; *Patterson v. Patterson*, 59 N. Y. (14 Sick.) 574; S. C., 17 Am. Rep. 384; *Dayhuff v. Dayhuff*, 27 Ind. 158; *Hart v. Houchin*, 50 id. 327. The principle of mutuality, in such cases, requires that the debts should not only be due to and from the same person, but in the same capacity. Id. See *McDaniel v. Hooks*, 30 Ga. 981.

In an action by an administrator to recover a debt due to his intestate, the defendant cannot set off a debt due to him by the administrator, for services rendered in behalf of the administrator, in the course of his administration of the estate. *Stuart v. Commonwealth*, 8 Watts (Penn.), 74. Nor can a claim due from a person who is executor, but which is due in his individual capacity, be set off against a demand due the testator. *Harbin v. Levi*, 6 Ala. 399; *Banton v. Hoomes*, 1 A. K. Marsh. (Ky.) 19; *Wisdom v. Becker*, 52 Ill. 342. A creditor of an intestate purchased part of the intestate's goods of his administrator, and it was held that he could not set off the amount against a debt due to him from the intestate at his decease. *Lambarde v. Older*, 17 Beav. 542; *Steel v. Steel*, 12 Penn. St. 64. So, in case of an executed contract of sale, by executors, of the property of their testator, the purchaser making no offer or attempt to rescind

the contract, the purchaser, in an action by the executors, as such, for the recovery of the purchase-money, cannot avail himself of false and fraudulent representations, made by the executors at the time of the sale, in respect to its subject-matter, either as a defense, or by way of recoupment or counter-claim. His remedy, if any, is against the executors personally. *Westfall v. Dungan*, 14 Ohio St. 276. See, also, *Phillips v. Keifer*, 2 Mete. (Ky.) 478.

Where suit is brought by executors against a legatee under the will of their testator, on an account for money alleged to be due, he cannot plead as a set-off the amount of his legacy, unless he shows the estate to be solvent, and in a condition to be distributed. *Dobbs v. Prothro*, 55 Ga. 73. And see *Guthrie v. Guthrie*, 17 Tex. 541; *Stokes v. Forman*, 12 La. Ann. 671. And in a suit by executors to foreclose a mortgage given to them, as executors, the mortgagor cannot set off a distributive share in the estate of the testator, which has not been ascertained, and ordered to be paid. *Irving v. DeKay*, 10 Paige, 319.

In an action by an administrator *de bonis non* against an attorney for money of the estate, collected during a prior administration, it is held that the defendant may set off a judgment of allowance in the probate court, against a former administrator, for professional services rendered the estate. *Turner v. Tapscott*, 30 Ark. 312.

§ 23. **Demands by or against banks.** See *ante*, p. 500, § 20. It is held that stock in a bank is not a set-off against a note given to the bank. *Whittington v. Farmers' Bank*, 5 Har. & J. (Md.) 489. And bank bills acquired after a bank has become insolvent and stopped payment cannot be set off against debts due to the bank at the time of such insolvency. *Diven v. Phelps*, 34 Barb. 224; *Exchange Bank v. Knox*, 19 Gratt. (Va.) 739; *Gee v. Bacon*, 9 Ala. 699. Nor can such set-off be made, although a portion of the bills of the bank were held by the defendant when the bank failed and the debt became due. *Eastern Bank v. Cupron*, 22 Conn. 639. On the repeal of the bank charter, a stockholder cannot set off claims purchased subsequently to the repeal, in an action on his note given for stock. *McLaren v. Pennington*, 1 Paige, 102. Nor can a debtor to a bank for borrowed money set off against his note, on a judgment rendered thereon, the dividend that will be coming to him as a stockholder when its affairs are wound up, even in equity, unless there is an express agreement to set off the debts against each other *pro tanto*. *Ruckersville Bank v. Hemphill*, 7 Ga. 396. And the bank-notes of a State bank which afterward organized as a National bank, cannot be set off against a judgment recovered by the National bank. *Thorpe v. Wegefarth*, 56

Penn. St. 82. So, it is held that deposits made with a firm of bankers, after the withdrawal of a partner, by the maker of a note given to them before such withdrawal, are not matter of set-off against the note. *Dawson v. Wilson*, 55 Ind. 216.

In an action by the indorsee against the drawer of a promissory note, payable at a particular bank, without defalcation or discount, the defendant cannot set off a demand he may have against the bank which discounted the note and transferred it to the plaintiff. *Tillou v. Britton*, 9 N. J. Law, 120.

A person indebted to an insolvent bank, on a note discounted for himself, may set off the proceeds of the discount passed to his credit on the books of the bank, but not a check drawn in his favor by another depositor. *Butterworth v. Peck*, 5 Bosw. (N. Y.) 341. See *McCagg v. Woodman*, 28 Ill. 84. One who is a debtor to a bank, the funds of which are placed in the hands of commissioners for liquidation, may properly claim a set-off for any thing due to him from the bank at the date of the assignment. *In re Van Allen*, 37 Barb. 225; *Finnell v. Nesbit*, 16 B. Mour. (Ky.) 351, on the ground that the defendant did not actually owe the bank any thing at the time its corporate existence terminated. *Id.*; *American Bank v. Wall*, 56 Me. 167; *Colt v. Brown*, 12 Gray, 233. And debtors of an insolvent bank in the hands of a receiver may set off demands which were due to them from the bank, whilst it was doing business, against the debts due from them to the bank. *Berry v. Brett*, 6 Bosw. (N. Y.) 627. But not the bills of the bank purchased by them after an injunction has issued against it preliminary to its winding up; and, especially, if the debtor be a director of the bank, and has purchased in the bills at a discount; the allowance of a set-off of bills so purchased, being in derogation of the rule of equality in payment, established by statute as between the bill holders of an insolvent bank. *Clarke v. Hawkins*, 5 R. I. 219.

And where a bank refuses to discount notes left with it for that purpose, and an action is afterward brought against the bank by the assignees of insolvency of the depositor to recover a claim held by the depositor against the bank before his insolvency, the notes cannot be set off. *Stetson v. Exchange Bank*, 7 Gray, 425. It was held that such naked possession of the notes by the bank, without even an authority to collect them and turn them into money, did not, with the debt due to it from the insolvent, constitute mutual credits within the meaning of the statute. *Id.*

A bank which has credited a depositor with the amount of a note discounted by it upon his fraudulent representations, and has paid his checks to that amount, can set up the fraud, in defense of an action by

him to recover subsequent deposits to an equal amount, unless it had adopted the contract of the note by its subsequent action. *Andrews v. Artisans' Bank*, 26 N. Y. (12 Smith) 298.

Where a bank brings assumpsit against a depositor for the amount of an over-draft, this is a waiver of the tort, and is subject to the general right of set-off. *Bank of the United States v. Macallester*, 9 Penn. St. 475.

§ 24. **Demands by or against insurance companies.** The claim for a partial loss, on a policy of insurance, is unliquidated in its nature, and cannot be the subject of a set-off, although the amount of the loss is agreed upon, conditionally, before suit brought, it being still an unliquidated demand, in the sense of the statute of set-off. *Diehl v. General Mut. Ins. Co.*, 1 Sandf. (N. Y.) 257. See, also, *Boddington v. Castelli*, 1 El. & Bl. 66; S. C. affirmed, *id.* 879. And the debtor of an insurance company cannot, after the insolvency of the company, purchase a claim against it, and set it off to the full amount against his debt to the company, but only to the amount to which he would be entitled in dividends from the assets of the company. *Long v. Penn. Ins. Co.*, 6 Penn. St. 421.

Insurers, incurring a liability for a loss, will be allowed to deduct the amount due on the premium note, such being the stipulation in the policy. *Dodge v. Union Marine Ins. Co.*, 17 Mass. 471. And see *ante*, p. 481, § 7; *Balt. Ins. Co. v. McFadon*, 4 Har. & J. (Md.) 31.

It was held in the supreme court of the United States, that the amount due on the policy of a fire insurance company, issued to a banker, who is also one of its directors, may be set off against a demand of the company for money deposited with him, bearing interest and payable on call; and that his right to such a set-off is equally available against its assignee in bankruptcy. *Scammon v. Kimball*, 92 U. S. (2 Otto) 362. But such a debt cannot be set off against the indebtedness of a stockholder in the company for unpaid shares in its capital stock, because moneys arising from that source constitute a trust fund for the payment of the bankrupt company's debts, to be equally divided among all the creditors of the bankrupt. *Id.*

The amount of a policy-holder's loss, sustained before the property of an insurance company has been sequestered, under the Massachusetts statute (Gen. Sts., ch. 58, § 6), can be set off against a debt due from the assured to the company, even if the company holds collateral security from the debtor. *Commonwealth v. Shoe, etc., Ins. Co.*, 112 Mass. 131.

§ 25. **Demands by or against corporations.** Where certificates of stock issued by a private association are made assignable by the arti-

cles of association, which reserve no lien upon them for the debts of the company, they are held not to be subject, in the hands of a *bona fide* assignee, to a matter of set-off held by the company against the original holder. *Spence v. Whitaker*, 3 Port. (Ala.) 297.

A receiver of an insolvent corporation, suing for the benefit of its creditors, on a cause of action on which the company itself could not have sued — as, for instance, to recover back payments made by the corporation in fraud of creditors — represents the creditors, and not the corporation; and the defendants cannot interpose as a set off a claim against the corporation. *Osgood v. Ogden*, 3 Abb. Ct. App. (N. Y.) 425; S. C., 4 Keyes, 70. So in a suit for tolls accruing after a sequestration of the property of a turnpike company, there was held to be no right of set-off of loans made to the company before sequestration. *Beeler v. Turnpike Company*, 14 Penn. St. 162. So it is held that the depositary of the funds of a corporation has no legal right to set off corporation bonds held by him, so as to satisfy or discharge the debt owed by him as such depositary, and, therefore, he cannot set them up against any creditor of the company. *Fox v. Reed*, 3 Grant's (Penn.) Cas. 81.

A railway company obtained possession of chattels under a judgment against the defendant, and used them until the judgment was reversed, and the property awarded to the latter. It was held that the claim of the latter for such use would be a good set-off against any liability on his part to the company which might subject him to garnishment. *Keyes v. Milwaukee, etc., Railway Co.*, 25 Wis. 691.

§ 26. **Demands by or against public officers.** A public officer cannot be permitted to blend his public duties with his private transactions. *Harper v. Howard*, 3 Ala. 284. Therefore, in an action to recover money received by an officer in his official capacity, a debt due from the plaintiff to the officer, in his private capacity, is not a subject of set-off. *Prewett v. Marsh*, 1 Stew. & Port. (Ala.) 17. Thus, in an action against a tax collector, by a township, for the amount of a tax committed to him for collection, the defendant cannot be allowed to set off a debt due him from the plaintiff. *Wilson v. Lewiston*, 1 Watts & Serg. 428. Nor can the treasurer of a corporation set off his own debt, when sued for money in his hands. *Russell v. First Presbyterian Church*, 65 Penn. St. 9. Nor can the defense of tender or set-off be interposed to suits brought by the State against the collectors of the revenue. *Commonwealth v. Rodes*, 5 Monr. (Ky.) 318.

No officer of a municipal government is empowered to pay himself his salary, or plead, in compensation, a demand made against him for moneys collected by him in his official capacity, by an amount due him

on account of his salary. His duty is to discharge the obligations of his office according to the terms of his acceptance thereof, and to get his pay as other officers get theirs. In other words, he cannot pay himself. *City of New Orleans v. Finnerty*, 27 La. Ann. 681; S. C., 21 Am. Rep. 569. But see *United States v. Ringgold*, 8 Pet. (U. S.) 150.

In Arkansas it is the duty of the circuit clerk to pay the tax on original writs, executions, deeds, etc., to the county collector (*Lee County v. Abrahams*, 31 Ark. 571); and he cannot set off allowances made him by the county court against the amount of such taxes in his hands. *Lee County v. Govan*, id. 610.

§ 27. **Demands against the government.** The State courts have frequently held that a plea of set-off against the State was not admissible, for the same reasons which forbid an original suit. A State being sovereign is not liable to be sued by an individual or corporation; the right, therefore, of set-off, which is in the nature of a cross-suit, does not exist in actions instituted by the State, except where such defense is expressly allowed by statute. *Chevallier v. State*, 10 Tex. 315; *State v. Leckie*, 14 La. Ann. 636; *Treasurers v. Cleary*, 3 Rich. (So. Car.) 372; *State v. Baltimore, etc., R. R. Co.*, 36 Md. 519; *Commonwealth v. Matlack*, 4 Dall. (Penn.) 303; *White v. The Governor*, 18 Ala. 767. It was, however, held, in an early case in Ohio, that although a judgment could not be rendered against the State, yet that in an action by the State the defendant might set off a claim against it. *State v. Franklin Bank*, 10 Ohio, 91. See, also, *State v. Gaillard*, 1 Bay (So. Car.), 500; *Powers v. Central Bank*, 18 Ga. 658; *State v. Dickenson*, 12 Sm. & M. (Miss.) 579.

In the imposition of taxes, the State acts in its sovereign character; and where it finds it necessary or convenient to resort to the courts to enforce the performance of the public duty, or the satisfaction of the public burden resting on the tax payer, it cannot be met and defeated by an ordinary plea of set-off. The tax is not a mere debt due from the citizen to the government, and the courts have no power to treat it as a debt without the express sanction of the legislature. *Newport, etc., Bridge Co. v. Douglass*, 12 Bush (Ky.), 673. So held in North Carolina as to town taxes. *Cobb v. Elizabeth City*, 75 No. Car. 1. So in Louisiana, a debt due to a municipal corporation for taxes cannot be set off or compensated by any debt due by the corporation. Thus, the tax due for one year cannot be compensated by an overpayment of taxes made by the debtor the year previous. *City of New Orleans v. Davidson*, 30 La. Ann. 541; id. 554. See, also, *Finnegan v. City of Ferdinandina*, 15 Fla. 379; 21 Am. Rep. 292.

State statutes cannot regulate set-off in suits by the United States, neither is there any act of congress to regulate it, though several imply that it may be allowed. *United States v. Prentice*, 6 McLean (C. C.), 65. And a claim which cannot be enforced actively against the government may yet be available as a set-off. See *United States v. Collier*, 3 Blatchf. (C. C.) 325; *Milnor v. Metz*, 16 Pet. (U. S.) 226; *United States v. Buchanan*, Crabbe, 563. When a defendant has in his own right an equitable claim against the government for services rendered, or otherwise, and which has been presented to the proper accounting officer of the government, who has refused to allow it, he may set up the claim as a credit in a suit brought against him for any balance of money claimed to be due by the government, and set them off (*United States v. Robeson*, 9 Pet. 319; *United States v. Giles*, 9 Cranch, 213); but he cannot buy up claims against the government and set them off. *Id.*

Where a post-office has been discontinued by the postmaster-general, and mails have ceased to be delivered there, the postmaster cannot in an action by the government to recover moneys coming into his hands before the discontinuance, set off against the claim damages sustained by him in being prevented from earning commissions, on the ground that the postmaster-general had no authority to remove him from his office. *Ware v. United States*, 4 Wall. 617.

And it is held that the United States may withhold pay due to an officer, and apply it to debts due from him to the United States, as an officer or an individual. *Gratiot v. United States*, 15 Pet. 336.

A town summoned as trustee or garnishee of an individual cannot set off taxes assessed by it on him against the debt due from it to him. *Hibbard v. Clark*, 56 N. H. 155; 22 Am. Rep. 432.

§ 28. **Effect of form of action on set-off.** It is said that nothing can be more fully settled than that damages arising on a special contract, cannot be made matter of set-off in an action of debt. Not, however, because a jury cannot ascertain the damages on a special contract, but because the policy of the law will not permit matters of a nature so totally distinct, and which require pleadings so totally different to be blended together in one action. *Smock v. Warford*, 4 N. J. Law (1 South.), 306.

In an action of covenant for uncertain damages, no set-off, or claim in the nature of set-off, can be allowed. *Dowl v. Fawcett*, 4 Dev. (No. Car.) L. 92. And see *ante*, p. 481, § 7. And a claim, founded upon contract, cannot be set off against a claim arising out of tort. *Donohue v. Henry*, 4 E. D. Smith (N. Y.), 162; *Humphreys v. Merritt*, 51 Ind. 197; *Moore v. Davis*, 11 Johns. 144; *Brown v. Phil-*

lips, 3 Bush (Ky.), 656. See *post*, p. 530, Art. 3. And after a tender of the amount secured by a chattel mortgage, and a refusal thereof by the mortgagee, he cannot set off the amount of his debt in an action of trover by the mortgagor, to recover the value of the property mortgaged. *Fuller v. Parrish*, 3 Mich. 211. See *ante*, p. 483, § 8.

It was held in Connecticut, that, to an action for money had and received, the defendant cannot set off a claim for money paid, unless upon an agreement of the parties to apply the latter claim in satisfaction of the former. *McLean v. McLean*, 1 Conn. 397. But in an action to recover back money paid by mistake, it was held that the defendant may, in Alabama, set off any debt which he may hold against the plaintiff. *Hall v. Chenault*, 13 Ala. 710. But see *Franklin Bank v. Raymond*, 3 Wend. 69.

§ 29. **Actions upon contracts generally.** See *ante*, p. 481, § 7. In Kentucky, a set-off can only be allowed to a suit upon a contract and growing out of a contract. *Brown v. Phillips*, 3 Bush (Ky.), 656. But the value of property wrongfully taken and converted to the plaintiff's use may be pleaded in set-off in an action *ex contractu* where the defendant could have waived the tort and sued in assumpsit. *Eversole v. Moore*, 3 id. 49; *Haddix v. Wilson*, id. 523. See, also, *Norden v. Jones*, 33 Wis. 600; S. C., 14 Am. Rep. 782.

It is said to be well settled, upon common-law principles, in Tennessee, that where the defendant has sustained damages by reason of the plaintiff's non-performance of his part of the agreement sued on, he may abate the plaintiff's recovery by the amount of such damages, and have judgment over against him for any amount or balance for which he may be found liable. *Overton v. Phelan*, 2 Head (Tenn.), 445. The amount of damages, to which the defendant is entitled in abatement in such case, is the damages which he would be entitled to recover in a cross-action by him against the plaintiff. *Id.* In Vermont, the statute of set-off extends to all matters of contract, express or implied, whether liquidated or not. The plea is a mere declaration, and may cover any matter of contract not expressly excepted in the statute. *Hubbard v. Fisher*, 25 Vt. 539. See, also, *ante*, p. 481, § 7.

Where the plaintiff sues on one part of a contract, consisting of mutual stipulations made at the same time, and relating to the same subject-matter, the defendant may recoup damages arising from the breach of another part. And this is held to be so, whether the different parts are contained in one instrument or in several, and whether one part is in writing and the other by parol. *Branch v. Wilson*, 12 Fla. 543; *Mell v. Moony*, 30 Ga. 413.

Where a plaintiff receives of the defendants, certain articles under

an arrangement to sell them, and to give the defendants a certain sum per gross as profits on such sales, the defendants are entitled in a proper suit, to set off against the plaintiff's demand whatever sums of such profits the plaintiff received under the arrangement. *Josselyn v. Bishop*, 25 Mich. 397.

So, a dealer in ice imposed restrictions on the right of his customers to sell again, and it was held that they were bound by their assent thereto, and that, in their action for damages for his refusal to supply them, evidence was admissible that they had violated such regulations. *New York Ice Co. v. Parker*, 8 Bosw. (N. Y.) 688; S. C., 21 How. 327.

But a promise by a creditor to allow a specified sum upon the debt to the debtor by way of damages for breach of a contract, void by the statute of frauds, is not available as a set-off or recoupment in an action for the debt, even though the void contract is such as might be specifically enforced in equity. *Lawrence v. Smith*, 27 How. (N. Y.) 327.

It is held that a bond debt may be set off against any demand for which *indebitatus assumpsit* will lie. *Downer v. Eggleston*, 15 Wend. 51. And a bill single for the payment of money may be set off in an action on a breach of covenant for the payment of specific articles at a certain time and place, the latter being in effect a money demand to an amount easily ascertainable. *Moore v. Weir*, 3 Sneed (Tenn.), 46.

§ 30. **Actions on bills, notes, etc.** If a note is made negotiable at a bank, the bank is authorized by the maker to advance on his credit to the owner of the note the sum expressed on its face. It would, therefore, be a fraud upon the bank to set up offsets against this note, in consequence of any transactions between the parties. *Mandeville v. Union Bank*, 9 Cranch, 9. And see *Knapp v. McBride*, 7 Ala. 19. In Missouri, a set-off cannot be pleaded to an action on a note made "payable without defalcation." *Maupin v. Smith*, 7 Mo. 402. But it was held in Pennsylvania that the words "without defalcation for value received," in a sealed note, do not preclude the defendant in an action thereon from making the defense of set-off. *Louden v. Tiffany*, 5 Watts & Serg. 367. And see *Baker v. Brown*, 10 Mo. 396; *Youngs v. Little*, 15 N. J. Law, 1. Property received collaterally, and not in payment of a note, cannot be set up by way of set-off, in an action on the note. *Thomas v. McConnell*, 3 McLean (C. C.), 381. But where a note is held as collateral for a sum greater than the amount secured, it is held that the maker of the note is entitled to a set-off to the amount of such excess against the payee. *Jones v. Hawkins*, 17 Ind. 550.

A claim for real estate cannot be set off against sums due by notes. *Girod v. Creditors*, 2 La. Ann. 546. And a note payable in work cannot be set off in an action on a note payable in money. *Prather v. M'Evoy*, 7 Mo. 598. Nor can expenses incurred by the hirer in successfully defending an action of trover by the bailor, for the conversion of the thing hired, be recouped against a note given for the hire. *Deens v. Dunklin*, 33 Ala. 47. And a bond for the delivery of an article on demand cannot be set off against a promissory note, without first proving that the article had been demanded. *Leas v. Laird*, 6 Serg. & R. (Penn.) 129. So, on a plea of set-off to an action on a promissory note, it was held that the defendant cannot recover a reasonable compensation for the part performance of a written contract to do certain work at a stipulated price, on such proof of a breach of said contract by the plaintiff as would excuse the defendant from its performance. *Smith v. Eddy*, 1 R. I. 476. A, the defendant, gave a promissory note to B, by whom it was indorsed to C, by C to D, and by D to E, the plaintiff. A, the defendant, pleaded in set-off a debt due to him from C, once the holder of the note, and it was held that the set-off could not be sustained. *Hooper v. Spicer*, 2 Swan (Tenn.), 494. The defendant, for a valid consideration, assumed and promised to pay the debts of R., which included three promissory notes held by N. Afterward, and before maturity, N. duly transferred these notes to the plaintiff, and it was held, in an action on the notes, that the defendant could set off a claim held against N. *Barlow v. Myers*, 64 N. Y. (19 Sick.) 41; S. C., 21 Am. Rep. 582; reversing S. C., 3 Hun (N. Y.), 720. See *Carpenter v. Longan*, 16 Wall. 271. But it was held that a note given by A to B, and not yet due, cannot, in equity, be set off against a note given by B to A, upon which A has brought an action for the benefit of C, to whom he assigned it, although C knew, at the time of the assignment, that A was insolvent and was subsequently declared a bankrupt. *Spaulding v. Backus*, 122 Mass. 553; 23 Am. Rep. 391. In *Winthrop Savings Bank v. Jackson*, 67 Me. 570; 24 Am. Rep. 56, the plaintiff lent the defendant money with a United States bond as collateral security. After the maturity, but before payment of the note, the bond was stolen from the plaintiff, and it was held, in an action on the note, that the defendant could not set off or recoup the value of the bond. And see *Robinson v. Safford*, 57 Me. 163.

In an action by a national bank on negotiable paper discounted by it, it is held that the defendant may set off the amount of usurious discounts on other transactions. The interest paid by the defendant beyond that authorized by the act of congress belongs to him, and the bank can hold it only for his use. *Lucas v. Government Nat. Bank*,

78 Penn. St. 228; 21 Am. Rep. 17. And see *Thomas v. Shoemaker*, 6 Watts & Serg. (Penn.) 179.

The indorser of a negotiable note discounted by a bank and by it transferred to assignees before maturity, for full value, has no right, when payment is demanded by the holders, to pay the note in the depreciated paper of the bank after it has failed. *Housum v. Rogers*, 40 Penn. St. 190.

A claim for damages, arising from the non-fulfillment of a contract to make the demand and give the notice requisite to fix the liability of the indorser of a note, is held to be a proper subject of set-off, in a suit brought against the owner of the note upon another note of which he is the maker. *Bidwell v. Madison*, 10 Minn. 13. But the redemption of a promissory note by the pledgor, on payment of an advance made upon it, will not carry with it the equitable right of set-off of a claim against the pledgee, in a suit by the pledgor against the maker of the note. *Thompson v. Harrison*, 1 Daly (N. Y.), 302.

A partial payment was made on a note and afterward the note was renewed for the whole amount, and it was held, in a suit on the new note, that the payment could be pleaded in set-off. *Wake v. Bank of Commonwealth*, 2 Dana (Ky.), 394. Damages on bills of exchange, paid by the defendant upon bills drawn by him on the plaintiff, and which the plaintiff was bound to pay, may be set off. *De Tastet v. Crousellat*, 1 Wash. (C. C.) 504. So, it was held that a sum due for professional services may be set off against a single bill, if such was the understanding of the parties. *Ashton v. McKim*, 4 Cranch (C. C.), 19. But in a suit upon a note given by the committee of a school district, for the erection of a school-house, it was held that damages sustained by the district, by a failure to perform the contract, cannot be set off against the note where they are held personally liable thereon. *Bayliss v. Pearson*, 15 Iowa, 279. And it was held in New York, that where a note is transferred by the payee for a valuable consideration, before maturity, in an action thereon in the name of the holder, for his benefit, the defendant cannot set off a demand against the payee, such case not being within the statute. *Prior v. Jacocks*, 1 Johns. Cas. 169; *Smith v. Van Loan*, 16 Wend. 659.

§ 31. **Action for work, labor and services.** In an action for negligence and breach of duty, the defendant cannot claim to set off his account for services. *Collins v. Groseclose*, 40 Ind. 414. Thus, in an action for damages for negligence, in keeping the plaintiff's sheep, founded upon a special written contract, the defendant will not be permitted to deduct from the damages the compensation which he claims for keeping the sheep. Such compensation, if any be due, must be

sought in a distinct action. *Crowninshield v. Robinson*, 1 Mas. (C. C.) 93.

Where the plaintiff renders services under a special contract, which he afterward violates, and then brings an action to recover the value of his services, the defendant may set off any payments he has made on account of the services, and the damages he has sustained by the breach of the contract. If they are equal to the value of the services, the plaintiff is not entitled to recover. If they fall short of it, the plaintiff may recover a sum equal to the difference between them, and the value of his services. *Elliot v. Heath*, 14 N. H. 131. See, also, *Heaton v. Colgrove*, 3 Ind. 265; *Noble v. James*, 2 Grant's (Penn.) Cas. 278. Such also is the English rule. Thus, it is said that "when a party engages to do certain work on certain specified terms, and in a specified manner, but, in fact, does not perform the work so as to correspond with the specification, he is not, of course, entitled to recover the price agreed upon in the specification; nor can he recover according to the actual value of the work as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed upon, subject to a deduction, and the measure of that deduction is the sum which it would take to alter the work so as to make it correspond with the specification." PARKE, J., in *Thornton v. Place*, 1 Moo. & Rob. 218. See, also, *Chapel v. Hickes*, 2 Car. & M. 214; *Stoddard v. Treadwell*, 26 Cal. 294; *Higgins v. Lee*, 16 Ill. 495; *Wright v. Cumpsty*, 41 Penn. St. 102; *Phelps v. Paris*, 39 Vt. 511. Against a suit, to recover payment for building a house, may be set off the damages sustained by its not being completed within the time specified in the contract for building it. *Abbott v. Gatch*, 13 Md. 314; *Cook v. Rhine*, 1 Bay (So. Car.), 16. See *Wagner v. Corkhill*, 40 Barb. 175. So, in an action for work and labor in painting the defendant's house, it was held that the defendant might show the breach of a written agreement to paint the house in a particular manner specified in the writing. *Locke v. Smith*, 10 Johns. 250. And if the plaintiff holds himself out to the defendant as fully competent to perform a certain duty, and in an action for such services it appears that the duty was not performed in a skillful and workmanlike manner, the amount of damages to the defendant may be set off by way of recoupment. *Robinson v. Mace*, 16 Ark. 97; *Goslin v. Hodson*, 24 Vt. 140. And in an action by an agent against his principal, to recover compensation for services, the latter may set off any damages he may have incurred in consequence of any action of the agent in reference to the subject-matter of his agency, after his authority ceased. *McEwen v. Kerfoot*, 37 Ill. 530.

But loss occasioned to a party to a building contract, by reason of deviations from the model selected, if done by his direction, assent or agreement, cannot be set off by him, in an action by the builder for the contract price. *McCausland v. Cresap*, 3 G. G. Greene (Iowa), 161. And see *Crookshank v. Mallory*, 2 Greene (Iowa), 257. So, it is held that a stipulation, in the nature of a penalty for the non-performance of an agreement to build a house, cannot be set off in an action brought for the price of the work. *Taylor v. Sandiford*, 7 Wheat. 13. So, in an action to recover compensation for tanning hides, the defendant was not permitted to set off damages sustained by reason of the unskillful execution of the work. *Cardell v. Bridge*, 9 Allen, 355. And in assumpsit for wages as a housekeeper the defendant cannot give evidence of malfeasance and embezzlement, on the part of the plaintiff, by way of set-off. *Heck v. Shener*, 4 Serg. & R. (Penn.) 249. And see *Hobbs v. Riddick*, 5 Jones' (N. C.) L. 80.

Where the special administrator of an engineer sued for the stipulated salary of the intestate, it was held that damages sustained by the employer, by reason of the engineer's unskillful performance of his duties, could not be set off against such salary, either in law or in equity. *Nashville, etc., Turnpike Co. v. Harris*, 8 Humph. (Tenn.) 558.

A defendant is not at liberty, for the purpose of turning the plaintiff out of court, to set up and claim the benefit of a contract which he concedes he refused to regard, and expressly repudiated. *McQueen v. Gamble*, 33 Mich. 344. Thus, where the plaintiff had performed services for the defendant, shown to be worth more than the plaintiff had received for them, and for which no bargain was made as to the price, except one which the defendant shortly after repudiated, it was held to be erroneous to rule that no recovery could be had on the common counts, and that the action should have been brought on the contract. *Id.*

Under a contract for work, the price was to be paid when the work was done. Afterward, by joint consent, payment for part of the work already done was made by giving a note therefor. In an action by the plaintiff upon the note, it was held that the defendant was not entitled to have the amount of an alleged claim for damages arising from the non-performance of the contract by the plaintiff allowed as a set-off, or counter-claim. *Walker v. Millard*, 29 N. Y. (2 Tiff.) 375.

And one having neither a general nor special property in goods, placed by him in the hands of a manufacturer who refuses to deliver them on demand, is not entitled to set off the value of such goods in an action brought by the manufacturer for work and labor spent on

other goods. *Collins v. Butts*, 10 Wend. 399; S. C. affirmed, 13 id. 139.

Where a millwright who had contracted to build a mill, put it into operation, and, before delivery, ground grain and received toll therefor, it was held in an action for the price of erection that the value of the tolls could not be regarded as a set-off, or in abatement of the price, and could only be recoverable, if at all, in a distinct action. *Allen v. McNew*, 8 Humph. (Tenn.) 46.

§ 32. **Actions for freight.** It is held under the English statute concerning set-offs that, in an action for freight, the loss and destruction of the goods, delivered to the plaintiff to carry, cannot be set off. *Dowsland v. Thompson*, 2 W. Bl. 910. Thus, to an action for freight the defendant pleaded, by way of defense on equitable grounds, that the plaintiff, in the course of his employment by the defendant, undertook to carry coal for the defendant, and by his negligence and unskillfulness the coal was lost, and that the cost price of the coal was equal to the plaintiff's demand, and, claiming equitably to set off the one against the other, and it was held that the plea was bad on demurrer. *Stimson v. Hall*, 1 H. & N. 831; 40 Eng. Law & Eq. 442. See, also, *Sherborne v. Siffkin*, 3 Taunt. 525. But the practice is otherwise under some of the American statutes of set-off. Thus, under a statute providing that the defendant in any action brought on a contract or agreement, either express or implied, having claims or demands against the plaintiff in the action, such claims or demands "shall, on proof, be set off and allowed against the plaintiff's demand," it was held in an action for freight, that the defendant might set off a loss of a portion of the goods agreed to be transported, by the carelessness and negligence of the carrier. *Edwards v. Todd*, 2 Ill. (1 Scam.) 462. So, in South Carolina, it was held that injury done to goods in transportation might be set off against a claim for freight, even though they had been delivered to, and been accepted by the consignee. *Cheves* (So. Car.), 60.

So, where judgment was recovered for freight, the plaintiffs not being residents of the State and having no property therein, the court entertained a bill to set off against the judgment the damages sustained by the defendant at law in his goods carried through the misconduct of the carriers. *Edminson v. Baxter*, 4 Hayw. (Tenn.) 112. See *post*, p. 544, Art. 4.

§ 33. **Action on sale of personal property.** It was held, in an early case in New York, that, in an action for the recovery of damages for the breach of a warranty in the sale of goods, the defendant is not entitled to a set-off of damages against the plaintiff. *Wilmot v. Hurd*,

11 Wend. 584. See, also, *Morrison v. Clifford*, 1 Cranch (C. C.), 583. But it is well settled in Connecticut that a vendee of personal property warranted, need not sue upon the warranty, but may reduce the vendor's damages in a suit brought for the price, by showing how much less the property was worth by reason of the defect warranted against. *Hitchcock v. Hunt*, 28 Conn. 343. See, also, *Eckles v. Carter*, 26 Ala. 563. And see *post*, p. 530, Art. 3. In an action for goods sold at auction for cash, the defendant may set off the plaintiff's note. *Stettinius v. Myers*, 4 Cranch (C. C.), 349. Where the vendor is to deliver goods at a particular place free of charge, the vendee may pay the government duties and set them off in a suit for the price. *Fitch v. Archibald*, 29 N. J. Law, 160. So, where part of an entire lot of logs have been accepted, and notes given therefor, in a suit on the notes the defendant may set off his damages for the non-delivery of the amount contracted for. *Fessler v. Love*, 43 Penn. St. 313. See, also, *Upton v. Julian*, 7 Ohio St. 95. So, in Pennsylvania, where a machine was guaranteed to perform well for three months, and defects occurred within that time, it was held that the warrantee could defalk damages on the contract, without proof of notice, within the three months. *Dean v. Herrold*, 37 Penn. St. 150. And it was held, in Kentucky, that a demand for unliquidated damages, for breach of warranty of the quality of a commodity, for which the note sued on was given, may be relied on as an equitable set-off against the note when the vendor is insolvent or non-resident, even where the note is in the hands of, and the action upon it brought by, a remote assignee of the vendor. *Taylor v. Stowell*, 4 Metc. (Ky.) 175. And in case, for deceit in a sale, if the property, kept by the purchaser, is of any value, or its use has been of any value to him, that value must be allowed to the defendant. *McLaren v. Long*, 25 Ga. 708. See *Johnson v. Wideman*, 1 Rice (So. Car.), 325.

But it was held that a distinct contract for the delivery of wheat could not be set off in a suit for goods sold and delivered, brought for the payment of flour. *Foster v. Bell*, 2 Miles (Penn.), 399.

A creditor, who orders goods from his debtor, which the latter owns and has on hand to sell, is not bound to accept a draft in favor of a third party for the price of the goods, and may set off against the price of the goods the vendor's indebtedness, on the ground of mutual dealings. But when a creditor sends his debtor into a distant market, as his agent, to purchase goods on his account, and the debtor executes the commission, the law implies a promise on the part of the creditor to pay the seller of the goods in the usual course of business,

and he cannot set off against the price of the goods the indebtedness of his agent. *Relf v. Bank of Mobile*, 20 Penn. St. 435.

Where a firm received goods from A to sell, and afterward gave an order for the delivery of the same goods, or of other goods of equal value, to B, they cannot, as against a claim set up by B, for the goods, sustain, as a set-off, a demand in favor of the firm against A, accruing before the date of the order. *Wickoff v. True*, Clarke's (N. Y.) Ch. 237.

An owner sold standing timber, but made a mistake in pointing out his boundary to the purchaser, so that some timber was cut from the land of an adjoining owner, who replevied the logs in the boom. The purchaser defended the suit at the owner's request, and was compelled to pay the value of the logs, less the expense he had been at in bringing them to the boom. In an action by the owner against the purchaser for the timber sold, it was held that the purchaser could not set off profits; the measure of damages was the increased price, if any, at the place of delivery, and the costs of the replevin suit. *Young v. Lloyd*, 65 Penn. St. 199.

§ 34. **Action on sale of real property.** It has been held that if a vendee was deceived in the purchase of land by misrepresentation, he may plead it, or give it in evidence as a set-off, against a bond given for the purchase-money. *Adams v. Wylie*, 1 Nott & M. (So. Car.) 78; *McFarland v. Carver*, 34 Mo. 195. Or, if a grantee has sustained damages, trespass, etc., from the negligence of the grantor in not supplying him with the muniments of title, such damages may be set off in a suit for the purchase-money. *Penn v. Preston*, 2 Rawle (Penn.), 14. Or, if one buys land and gives his note, and an incumbrance is afterward discovered, he may set off the incumbrance and set it off on the note. *Sheldon v. Simonds*, Wright (Ohio), 724. See, also, *Schuchman v. Knoebel*, 27 Ill. 175; *Key v. Henson*, 17 Ark. 254. So, under the statute of Alabama, if a vendee, with covenants of warranty, buys in an outstanding vendor's lien, at a price less than the amount of the purchase-money and interest, this demand, if reasonable, would be a good set-off in an action on the note given for the purchase-money. *Holley v. Younge*, 27 Ala. 203. And in a suit on a note given in consideration of a certain tract of land, the defense is available, by way of set-off, that the plaintiff falsely represented that the land did not overflow, and that valuable lands, outside of the boundaries of the tract, for which the note in suit was given, were included in it. *Gibson v. Marquis*, 29 id. 668.

On the sale of standing wood the vendor agreed to indemnify the vendees, if any damage occurred to the wood by burning the adjoining

fallow. In an action by the vendor on a note given by the vendees, it was held in New York, that the vendees might recoup the damages the wood had received by burning the fallow. *Batterman v. Pierce*, 3 Hill, 171. And it was held in Pennsylvania, that where several bonds are given as security for the purchase-money of an estate, each containing a covenant binding the vendor to construct a well upon the premises, and the bonds are all paid but one, the whole damage for non-compliance with the condition may be set off in the last suit. *Maguire v. Howard*, 40 Penn. St. 391.

But it was held, in Iowa, that the damages sustained by reason of a breach of the covenant of seizin cannot be set off in a suit for the purchase-money. *Camp v. Douglas*, 10 Iowa, 586. In New Hampshire, in an action upon a note given for the price of land conveyed, damages for the breach of covenants in the deed of such land may be set off, if capable of exact computation; but if uncertain and unliquidated, they cannot be set off. *Drew v. Towle*, 27 N. H. 412. Where a vendor failed to enjoin a judgment on his covenant to convey, it was held, in Kentucky, that he might have a decree for a set-off of any sum due for rent, profits and waste. *Brown v. Starke*, 3 Dana (Ky.), 306. A compromise of an outstanding claim, made by the grantee without the knowledge or consent of the grantor, is held to be no ground for an offset in an action to recover the purchase-money of land sold and conveyed. *Taggart v. Stanberry*, 2 McLean (C. C.), 543. See *Pepper v. Haight*, 20 Barb. 429. And where the purchaser of land permitted the vendor, under a parol reservation as part consideration of the sale, to harvest and remove the crops growing thereon, it was held, in Indiana, that the contract was executed and that the purchaser could not set off their value against a suit by the vendor for goods sold, etc. *Heavilon v. Heavilon*, 29 Ind. 509.

Under the California practice, legal damages actually suffered from a breach of the vendor's covenants, may be set off in an equitable action for the price. *Walker v. Sedgwick*, 8 Cal. 398.

§ 35. **Actions of replevin.** We have seen (*ante*, p. 483, § 8), that set-off is not generally allowed in replevin, that being in form an action *ex delicto*. But where the plaintiff in replevin sought the restitution of cattle, and damages for their detention, it was held that the defendants might set up a claim in set-off for rescuing, taking care of and feeding them, under the Iowa Code. *Dunham v. Dennis*, 9 Iowa, 543. And in replevin upon a distress for rent, the tenant, under the Virginia statute, is entitled to the damages accrued by the failure of the lessor to make repairs according to his covenant. *Murray v. Pennington*, 3 Gratt. (Va.) 91. But, in Delaware, a set-off of repairs

cannot be pleaded to an avowry for rent, in an action of replevin. *Goslin v. Redden*, 3 Harr. (Del.) 21.

It was held by the court in Tennessee, that the vendor of a chattel, who, upon the theory that there was no valid sale, sues the vendee in replevin therefor and loses the suit, so that a judgment is recovered against him for the value of the article, may afterward file his bill, and, on the ground of the insolvency of the vendee, set off his demand for the price of the chattel against the judgment in the hands of an assignee with notice of the equity. *Howe Sewing Machine Co. v. Zachary*, 2 Tenn. Ch. 478.

A set-off will not be allowed, nor can the accounts between the parties be adjusted in an action of trover. *Stow v. Yarwood*, 14 Ill. 424.

Property attached by an officer upon mesne process was replevied by him. In the replevin he recovered judgment for a return of the property, and no return being made, he brought an action on the replevin bond, and it was held that damages recovered against him by the plaintiff in replevin, for a false return on the process upon which he originally attached the property, could not be reconped or set off against the damages recoverable by him in the action on the bond. *Wright v. Quirk*, 105 Mass. 44.

In *Boute v. Hall*, 2 Cin. (Ohio) 33, it was held that a verdict for the defendant in replevin and an expected judgment thereon, although assigned before the judgment was rendered, may be a proper subject of set-off, in an action to recover the original price of the property replevied.

§ 36. **Actions of ejectment.** There is said to be no authority for the application of the doctrine of set-off to an action of ejectment. *Nutwell v. Tongue*, 22 Md. 419. But against a claim for mesne profits in the nature of damages, the value of improvements made by the defendant is a fair set-off, provided he took possession of the premises *bona fide*. See *Martin v. Evans*, 1 Strobl. (So. Car.) Eq. 350; *Scott v. Alexander*, 2 Houst. (Del.) 321; *Mollam v. Griffith*, 3 Paige, 402; *Fitch v. Cornell*, 1 Saw. 156. But it is held that trespassers are not entitled to the benefit of this principle, except where the profits of the premises have been increased by the repairs or improvements which have been made. In that case, it is proper for the jury to take into consideration the improvements or repairs and diminish the profits by that amount, but not below the sum which the premises would have been worth without such improvements or repairs. Whether the defendants are trespassers is a question of fact to be submitted to the jury. *Beverly v. Burke*, 9 Ga. 440.

In an action to recover lands purchased with the plaintiff's money by the defendant's ancestor, as guardian of the plaintiff in his own name, the defendants were permitted to set up that a suit had been brought against their ancestor by the plaintiff's then guardian, in which all moneys ever received by him were recovered and paid. *Childs v. Griswold*, 15 Iowa, 438.

§ 37. **Defense, how interposed.** We have seen (*ante*, p. 473, § 1) that a set-off is in the nature of a cross-action, and is governed by the same principles as a cross-action. See, also, *Gilmore v. Reed*, 76 Penn. St. 462; *Wisecarver v. Kincaid*, 83 id. 100; *Evans v. Bell*, 45 Tex. 553. A set-off is to be regarded in all respects as if it were a separate action by the defendant against the plaintiff (*Everson v. Fry*, 72 Penn. St. 326, 330); and it will be bad on demurrer, unless it discloses such a state of facts as would entitle the defendant to his action if he were plaintiff in the prosecution of a suit. *Kershaw v. Merchants' Bank*, 7 How. (Miss.) 386; *Crawford v. Simonton*, 7 Port. (Ala.) 110. The plea of set-off must, therefore, describe the demand with reasonable certainty, so as not to take the plaintiff by surprise (*Lewis v. Culbertson*, 11 Serg. & R. [Penn.] 48; *Perrine v. Warren*, 3 Stew. [Ala.] 151; *Semenza v. Brinsley*, 18 C. B. [N. S.] 467); and it is said that "it would be dangerous to allow a deviation from this rule, and to permit a defendant, upon the statement of remote and conjectural possibilities, to enter into the pursuit of a defense rather than the proof of one." SERGEANT, J., in *Irwin v. Potter*, 3 Watts, 271. It has been even held, that a variance between the allegation and the proof will be as fatal in a plea of set-off as in a declaration. *Rotan v. Nichols*, 22 Ark. 244.

A plea of set-off, which does not allege how much and for what the plaintiff is indebted to the defendant, is bad (*Attwool v. Attwool*, 1 El. & Bla. 21; 18 Eng. L. & Eq. 386; *Bernard v. Mullott*, 1 Cal. 368); and when a part only of a set-off is allowable, it is incumbent upon the defendant to separate the admissible from the inadmissible parts, or the whole will be rejected. *Rootes v. Wellford*, 4 Munf. (Va.) 215; *Sennett v. Johnson*, 9 Penn. St. 325. So, the plea of set-off should aver that the debt set off was a subsisting demand, not only at the commencement of the action, but at the time of plea pleaded, and that the plaintiff is liable therefor. *Robinson v. Mace*, 16 Ark. 97. And see *Dendy v. Powell*, 3 Mees. & W. 442; *Evans v. Prosser*, 3 Term R. 186; *Braithwaite v. Coleman*, 4 Nev. & Man. 654; *Dilley v. Roman*, 17 Md. 337. A plea of set-off refers to the commencement of the action, and must be true and good at that date, and if it is not barred by the statute of limitations at that time, it does not become so afterward during the pendency of the action.

Brumble v. Brown, 71 No. Car. 513; *Walker v. Clements*, 15 Ad. & El. (N. S.) 1046. But it is held that the plea of payment is not of itself such notice of a set-off as will stop the running of the statute, but that the defendant must either plead the set-off or give notice of it as special matter. *Wisecarver v. Kincaid*, 83 Penn. St. 100.

Although a set-off be pleaded informally, yet if the pleading show sufficient facts to constitute a legal and valid claim against the plaintiff, it will be sufficient. *Horine v. Moore*, 14 B. Monr. (Ky.) 251; *Wallace v. Bear River, etc., Co.*, 18 Cal. 461. But the set-off pleaded must be strictly responsive to the issue. See *Key v. Henson*, 17 Ark. 254; *Anderson v. Reynolds*, 14 Serg. & R. 439; *Kern v. Hazlerigg*, 11 Ind. 443.

Set-off must be specially pleaded, and cannot be given in evidence under a plea of never indebted. *Graham v. Partridge*, 1 Mees. & W. 395. See *Patterson v. Steele*, 36 Ill. 272; *Cox v. Jordan*, 86 id. 560; *Skinner v. King*, 4 Allen, 498; *Lord v. Ellis*, 9 Iowa, 301; *Beers v. Waterbury*, 8 Bosw. (N. Y.) 396; *Nelson v. Wellington*, 5 id. 178. In an early case, in New Jersey, it was held that evidence of set-off, unless by agreement of the parties, could only be given under a plea of payment. *Phillips v. McCullough*, 1 Penn. (N. J.) 69. In Alabama, a set-off must be by a special plea. *Kannady v. Lambert*, 37 Ala. 57. In Ohio, it was held that a set-off must come in under notice, and could not be pleaded. *Putnam v. Clark*, Wright (Ohio), 595. In Pennsylvania, no other plea than payment is necessary to let in set-off (*Balsbaugh v. Frazer*, 19 Penn. St. 95); but it is held, that evidence of set-off is not receivable under such a plea unless the plea was accompanied with a notice of special matter. *Glamorgan Iron Co. v. Rhule*, 53 Penn. St. 93. And see *Finlay v. Stewart*, 56 id. 183. In an early case, in Kentucky, it was held that a notice of set-off was admissible only under the general issue, and that it might be given in court. *Morrison v. Hurt*, Hard. (Ky.) 157. In Mississippi, it was held that the plea of set-off may be given in evidence under the plea of non-assumpsit, if the account in set-off be filed with the plea. But the plea of payment was held to be more appropriate. *Alliston v. Lindsey*, 12 Sm. & M. (Miss.) 656. In Missouri, it was held that a set-off could not be proved under a plea of payment. *Oldham v. Henderson*, 4 Mo. 295. Under the early statute of New York, a set-off could not be specially pleaded, but had to be taken advantage of under the general issue, with notice. *Williams v. Crary*, 5 Cow. 368. See *post*, p. 543, Art. 3, § 7.

It is held, in Virginia, that, when an equitable set-off is pleaded as a defense in a suit at law, the rules governing in an equitable forum must

apply, and the plaintiff should be permitted to rebut the claim by any evidence which would be considered appropriate to his defense if the defendant had elected to proceed by bill in equity. *Caldwell v. Craig*, 21 Gratt. (Va.) 132.

§ 38. **Effect of set-off.** There is no compulsion upon a defendant to plead a set-off, and if he pleases he may bring a cross action, provided he and his attorney choose to incur the odium of an obstinate and litigious character, and the censure of the court which will follow, unless good reason can be shown for not pleading such set-off. *Green v. Law*, 2 Smith (32 Eng. L. & Eq.), 668.

But if a party to a suit, either plaintiff or defendant, presents a demand which is legal and proper to be allowed, if supported by sufficient testimony, and the jury pass upon it and disallow it, such demand cannot be received, or set off in another suit between the same parties. *Hatch v. Benton*, 6 Barb. 28. And see *Miller v. Manice*, 6 Hill, 114; *Inslee v. Hampton*, 11 Hun (N. Y.), 156. And although a demand be not in strictness admissible as a set-off, yet if it was admitted without objection, and has been once tried, that judgment is conclusive, and the party will be precluded from afterward maintaining an action for the subject-matter thus set off. *McLean v. Hugarin*, 13 Johns. 184; *Wilder v. Case*, 16 Wend. 583. But see *Manny v. Harris*, 2 Johns. 24. In a recent case, in Pennsylvania, it was held that a demand might be set off on the trial of a cause in court, although it was presented in another suit between the same parties before arbitrators, from whose award the plaintiff appealed. *Bitzer v. Killinger*, 46 Penn. St. 44.

If the defendant pleads a set-off, and pays the balance of the plaintiff's demands into court, the plaintiff having refused to receive it before suit, if the jury allow the set-off, they may find for the defendant, and the plaintiff will have to pay the costs. *Shiel v. Randolph*, 4 McCord (So. Car.), 146.

Although a party files a set-off, it does not preclude him from relying upon any other just defense on the trial of the cause. *Price v. Combs*, 7 Halst. (N. J.) 188. It has however been held, that a plea of set-off without a denial of the plaintiff's claim admits the facts alleged by the plaintiff, and leaves the defendant to prove his set-off (*Gregory v. Trainor*, 4 E. D. Smith [N. Y.], 58); and if there is no evidence to sustain the plea, the judgment must be for the plaintiff's demand. *Raymond v. Kerker*, 81 Ill. 381. In the case last cited it is held that where the defendant in a distress warrant files a plea of set-off, and an issue is made thereon, the indebtedness claimed by the plaintiff is admitted by the pleading, and it is not proper to permit the defendant, upon such an issue, to prove or attempt to prove that the plaintiff had,

before the expiration of the term for which the rent is claimed, sold and conveyed the leased premises to a third person. See *ante*, p. 473, § 1. But a notice of a set-off in general contains, either actually or by intendment of law, a denial of the plaintiff's demand. *Morgan v. Boone*, 1 J. J. Marsh. (Ky.) 586.

A set-off, being in the nature of a cross-action, may be withdrawn, in analogy to suffering a nonsuit when the evidence is found to be too weak to support it. But, like a nonsuit, the withdrawal of it ought to be explicit. *Muirhead v. Kirkpatrick*, 5 Watts & Serg. 506; *Theobald v. Colby*, 35 Me. 179. In Pennsylvania, set-off may be withdrawn, even where the defendant has availed himself of his privilege under the defalcation act, of putting himself in the attitude of an assailant, and has claimed a verdict for a balance in excess of the plaintiff's claim. *Gallagher v. Thomas*, 2 Brewst. (Penn.) 531.

ARTICLE II.

SETTING OFF JUDGMENTS.

Section 1. In general. The practice of setting off one judgment against another, between the same parties and due in the same right, is said to be ancient and well established. Some of the adjudged cases go upon the principle of extending the statutes of set-off in their spirit of equity and justice; others hold the exercise of the power independent of the statutes of set-off, and rest it upon the general jurisdiction of a court over the cause and the parties when before them. *Holmes v. Robinson*, 4 Ohio, 90. See *Simpson v. Hart*, 14 Johns. 63; *Temple v. Scott*, 3 Minn. 419. In *Simpson v. Lamb*, 7 Ell. & Ell. 84; 40 Eng. L. & Eq. 59, it was said that the privilege of setting off a judgment is not an inherent incident of the suit, but is given by permission of the court with reference to all the circumstances of the transaction. See, also, *Chandler v. Drew*, 6 N. H. 469. In *Tolbert v. Harrison*, 1 Bailey (So. Car.), 599, it was held that applications of this kind, which are founded on no positive statute, or any fixed rule which compels the court to grant them, are addressed to the discretion of the court; and in the exercise of that discretion, even though the set-off might legally be made, yet if the court sees that injustice will be done by granting the order of set-off, it is uniformly refused. See, also, *Pate v. Gray*, Hempst. 155; *Conable v. Bucklin*, 2 Aik. (Vt.) 221; *Herman v. Miller*, 17 Kans. 328; *Burns v. Thornburgh*, 3 Watts, 78; *Davidson v. Geoghagan*, 3 Bibb (Ky.), 233. Whether a set-off shall be allowed in a given case "is indeed a matter resting

in discretion, but this means a judicial discretion, regulated by the principles of equity and justice; not a wanton, capricious, or arbitrary determination of the will." *PLATT, J.*, in *Simson v. Hart*, 14 Johns. 63.

One judgment may be set off against another, through the equitable powers of the court; but, to a judgment ripe for execution, there can be but one answer, to wit, payment pure and simple. *Thorp v. Wegefarth*, 56 Penn. St. 82.

§ 2. **What judgments, and by whom.** Judgments of the same court, in different districts, may be set off against each other. *Noble v. Howard*, 2 Hayw. 14. And judgments may be set off against each other, even though granted by different courts, provided there be mutuality in the claim. *Brooks v. Harris*, 41 Ind. 390; *Rix v. Nevins*, 26 Vt. 384; *Wright v. Mooney*, 6 Ired. (No. Car.) 22. It was, therefore, held, in New York, that the supreme court may, on motion, direct a judgment of an inferior court to be set off against a judgment of the supreme court. *Kimball v. Munger*, 2 Hill, 364. See, also, *Simpson v. Hanley*, 1 Maule & Sel. 696. So, it is held that demands which in their nature cannot be made the subject of set-off — such, for instance, as arise out of personal torts — as soon as they are put into judgments, are placed upon the same legal footing as all other judgments, irrespective of the nature of the action in which they were recovered. That is, all the peculiar features which may have characterized a claim, whether privilege or disability, are at once lost sight of, and merged, when judgment is perfected on it, and the demand takes rank equally among all other judgments. *Temple v. Scott*, 3 Minn. 419; *Simson v. Hart*, 14 Johns. 63. And, in New York, it seems that the supreme court, in the exercise of its equitable powers, has authority, in an action brought for that purpose to compel the set-off of a demand, not in judgment, against a judgment; and this, although the demand is a verdict in an action for a personal tort. *Zogbaum v. Parker*, 66 Barb. 341; S. C. affirmed, 55 N. Y. (10 Sick.) 120. See, also, *Davidson v. Alfaro*, 16 Hun (N. Y.), 359; S. C., 54 How. 486. But, under the statute of Tennessee — and such is declared to be the general rule — the right to set off judgments against each other pertains only to those founded on matters *ex contractu*; otherwise, a party might circumvent the exemption laws, by seizing and detaining his debtor's property, letting judgment therefor go by default, and getting such judgment credited upon his own. *Duff v. Wells*, 7 Heisk. (Tenn.) 17. So, it is laid down as a general rule that to a judgment there can be no set-off of a debt not in judgment. *Thorp v. Wegefarth*, 56 Penn. St. 82. As, where the party moving had obtained a verdict which he sought to set off against a judgment in favor of his adversary, the motion was denied

on the sole ground that the final judgment had not been obtained. *Garrick v. Jones*, 2 Dowl. P. C. 157. And it was held that a promissory note, on which no judgment or decree had passed, was not a proper subject of set-off against a decree for costs. *Dunkin v. Vandenberg*, 1 Paige, 622. The spirit of the rule seems to be, that the subject-matter of the set-off must be clear and indisputable, and conclusive upon the party, and must have passed the ordeal of a judicial determination in a case where the court had acquired jurisdiction of the party, either by his appearance, or by personal service of process upon him. *Harris v. Palmer*, 5 Barb. 105.

The right to set off one judgment or decree against another, by a motion to a court of equity, or by a summary application to the equitable powers of a court of law, exists only in those cases where the debts on both sides have been finally liquidated, by judgment or decree, before the assignment of either of them to a third party. *Gay v. Gay*, 10 Paige, 369. See, also, *Swift v. Prouty*, 64 N. Y. (19 Sick.) 546.

In New York a defendant has a right to assign to his attorney the prospective costs against his adversary, in consideration of the services to be rendered by the attorney in earning such costs; and where such transfer has been made, in case the defense is successful, the claim of the attorney to a judgment for the costs cannot be defeated by setting off against the same a prior judgment in favor of the plaintiff, against the defendant. *Perry v. Chester*, 53 N. Y. (8 Sick.) 240. But where, upon judgment for the plaintiff, his counsel gave notice in open court that one-half of the judgment had been assigned to them, it was held that the right of the defendant to set off a previous judgment, recovered by him against the plaintiff, could not be affected by such assignment. *Wright v. Treadwell*, 14 Tex. 255.

A party seeking to set off a judgment need not show that it was obtained in his name. It is sufficient that he is the assignee, but he must be really such, and not the mere agent or trustee of another. *Mason v. Knowlson*, 1 Hill, 218; *Meador v. Rhyne*, 11 Rich. (So. Car.) L. 631; *Wilson v. Reaves*, 4 Sneed (Tenn.), 173. In other words, a party cannot set off a judgment unless he is the beneficial, and not merely the nominal owner of it. *Turner v. Satterlee*, 7 Cow. 480; *Porter v. Davis*, 2 How. (N. Y.) 30. And a judgment purchased by a party, with a view to set it off, and upon condition that, if he failed to obtain the set-off, on motion, the assignment should be void, and the assignor pay the costs of the motion, cannot be set off. *Miller v. Gilman*, 7 Cow. 469. And it was held, in *Reeves v. Hatkinson*, 3 N. J. Law, 751, that an assigned judgment is not a proper subject of set-off in the

hands of the assignee. See *Goodwin v. Richardson*, 44 N. H. 125. So, it was held that a judgment, obtained and assigned after the commencement of a suit, cannot be set off in that suit. *Hawthorn v. Roberts*, Hard. (Ky.) 75. But see *contra*, *Parrott v. Underwood*, 10 Tex. 48.

It is held, in Tennessee, that a debt due from the assignor of a judgment to the defendant in the judgment cannot be set off by bill in equity against a *bona fide* holder of the judgment, without notice. But it is otherwise at law. *Catron v. Cross*, 3 Heisk. (Tenn.) 584. And it is held, in Indiana, that inasmuch as a cause of action is merged in a judgment therefor, and the right of set-off is thereby extinguished, the judgment defendant cannot set off against the judgment debt due the plaintiff, a debt of record against the plaintiff's assignor of the original debt. *Ault v. Zehering*, 38 Ind. 429.

A judgment against A and B, in their individual capacities, cannot be set off against them as administrators. *McChesney v. Rogers*, 8 N. J. Law, 272. And where an administrator has bought a judgment against a plaintiff, since the entry of a judgment against him for a debt owing by the intestate, he will not be permitted to set off such judgment. *Hills v. Tallman*, 21 Wend. 674. See *Patterson v. Patterson*, 59 N. Y. (14 Sick.) 574; 17 Am. Rep. 384. And it is laid down as a general doctrine, that where different interests are involved, or one of the parties may be injuriously affected by a decision on the merits of the motion, as where it is shown that persons besides the nominal creditor are interested as legatees or assignees in the demand on which one of the judgments is rendered, a set-off of judgments will not be allowed. *Taylor v. Williams*, 14 Wis. 155; *Goodwin v. Richardson*, 44 N. H. 125; *Holmes v. Robinson*, 4 Ohio, 90.

But in respect to the doctrine of setting off judgments, the courts have not been exact in requiring the mutual debts to be due to and from the same number of persons. See *Ballinger v. Tarbell*, 16 Iowa, 491; *Colquitt v. Bonner*, 2 Kelly (Ga.), 155; *Hutchins v. Riddle*, 12 N. H. 464. Under the statutes of Connecticut a judgment against two parties may be set off in equity against the individual claim of one. *Spurr v. Snyder*, 35 Conn. 172. See, also, *Robinson v. Burton*, 2 Houst. (Del.) 62. But see *Corwin v. Ward*, 35 Cal. 195.

Where a judgment creditor is insolvent, and the judgment debtor has a claim against him, which is the subject of set-off, it is held that the former cannot, by assigning the judgment, defeat the right of the latter to have his claim set off against a like amount of the judgment. The assignee stands in no better condition than the judgment creditor,

and is subject to the same equitable rights which existed against him. whether he is an assignee for a valuable consideration without notice of the debtor's claim, or otherwise. *Levy v. Steinbach*, 43 Md. 212. See *ante*, p. 497, Art. 1, §§ 18, 19.

§ 3. **Setting off judgments and executions, etc.** An officer has power to set off one execution against another, between the same parties, and both in his hands at the same time. *Culver v. Pearl*, 1 Tyler (Vt.), 12. But it seems that he is not obliged to do so at the request of one of the parties. *Anonymous*, Brayt. (Vt.) 118. And he cannot set off the costs due to the attorney in the suit for which such attorney has a lien. *Dunklee v. Locke*, 13 Mass. 525. Nor can executions in the hands of an officer be set off against each other, where the sum due on the first has been *bona fide* assigned before the second comes to his hands. *Primm v. Ransom*, 10 Mo. 444.

But it was held in Maine that where an officer has cross executions put into his hands, and he is requested to set off one against the other, he may require an indemnity, but it is his duty to make the set-off, and if he fails to do so he will become personally liable. *Leathers v. Carr*, 24 Me. 351. So it was held in Massachusetts that an officer holding executions of the respective parties cannot lawfully refuse to set off the one against the other on the ground that he had due notice of the assignment of the first execution when it was put into his hands. But that, in order to justify the officer in refusing to make the set-off, it must appear by his return, or otherwise, that the execution first delivered to him was assigned before the creditor in the second execution became entitled to the sum due thereon. *Porter v. Leach*, 13 Mete. 482. So it was held that where an officer has two executions which he is legally authorized to serve, and several persons are debtors in one execution, and but one of the debtors is creditor in the other, the officer is obliged to set off one execution against the other; for the creditor in the second execution might satisfy the execution against his co-debtors and himself, and if he thought proper to apply his execution to that purpose, he might. *Goodenow v. Buttrick*, 7 Mass. 140.

But the court will not, upon motion, enable a defendant to set off, in a summary way, a debt for which he has obtained no judgment, against the plaintiff's execution, but he will be left to his action for the recovery of it. *Philpson v. Caldwell*, 6 Taunt. 176.

Ordinarily, cross-judgments between the same parties may be set off when the rights of third parties are not affected thereby, whenever the executions issued thereupon could be set off by the officer holding them, and the court may withhold judgment in one of the cases for the purpose of securing a set-off of the judgments. *New Haven Copper Co. v.*

Brown, 46 Me. 418. But as a general rule, the court will not set off judgments in cross-actions between the same parties, where it appears that other persons are interested by an assignment of the demand on which one of the judgments is rendered. *Makepeace v. Coates*, 8 Mass. 451. And see *Duncan v. Bloomstock*, 2 McCord (So. Car.), 318; *ante*, p. 526, § 2.

§ 4. **What may be set off against judgments.** We have seen (*ante*, p. 526, § 2), that to a judgment there can be no set-off of a debt not in judgment. Thus, a note cannot be set off against a judgment. *Bagg v. Jefferson Common Pleas*, 10 Wend. 615. So an unliquidated contract for land will not be set off against a judgment, when the remedy at law is complete. *Bradley v. Morgan*, 2 A. K. Marsh. (Ky.) 369. But upon a decree against a vendor for the specific performance of the contract of sale, he was allowed to set off, against the purchase-money, the costs of the suit. *Van Rans v. Parcells*, 2 Edw. Ch. (N. Y.) 600. And where, in the case of mutual demands, one of the parties is insolvent, and holds a judgment against the other, the debts against the holder of the judgment should be set off against it. *Rowzee v. Gregg*, 6 Litt. (Ky.) 487. And see *Keightley v. Walls*, 27 Ind. 384; *Moody v. Dowdal*, 2 A. K. Marsh. (Ky.) 212; *Brazelton v. Brooks*, 2 Head (Tenn.), 194. But it is held that courts of equity will not interfere to set off a claim not subsisting at the commencement of a suit at law, against the judgment, even upon the suggestion that the plaintiff in the action at law is insolvent. *Bemis v. Simpson*, 2 Ga. Dec. 224.

Under the statute of Connecticut, providing that debts may be set off against judgments in all actions of trespass other than such as are brought for damages for the taking of property exempt from execution, etc., it was held that it did not avail a party seeking such a set-off that the property taken was in part exempt and in part not; or that the property was taken without legal process. *Talbot v. Ellis*, 33 Conn. 235.

ARTICLE III.

COUNTER-CLAIM.

Section 1. Definition and nature. The term "counter-claim" is new in our jurisprudence, being introduced therein by the adoption of reformed codes of procedure in many of the States. The term will be found to vary somewhat in meaning in the different States which have adopted it, but the *general* properties of the counter-claim are the same wherever it has been introduced, as will be seen from the following definitions and descriptions. In New York, a counter-claim is defined

to be a kind of equitable defense which is permitted, under the provisions of the Code, to be set up, when it arises out of the contract set forth in the complaint. It is broader and more comprehensive than recoupment, though it embraces both recoupment and set-off; and it is intended to secure to a defendant all the relief which either an action at law, or a bill in equity, or a cross-suit would have secured on the same state of facts. But it must be something which resists or modifies the plaintiff's claim. *Leavenworth v. Packer*, 52 Barb. 132; *Clinton v. Eddy*, 1 Lans. (N. Y.) 61; S. C., 54 Barb. 54; 37 How. 23; *Vasser v. Livingston*, 13 N. Y. (3 Kern.) 248. It may be for either liquidated or unliquidated damages and for unliquidated damages arising on a contract different from the contract on which the action was brought, and of an equitable or legal nature. *Boston Mills v. Eull*, 6 Abb. (N. S.) 319; S. C., 37 How. 299. But a counter-claim, to be available to a party, must afford to him protection in some way against the plaintiff's demand for judgment, either in whole or in part. It must show that the plaintiff is not entitled, either at law or under the applications of just principles of equity, to judgment in his favor, as, or to the extent, claimed in the complaint. *Mattoon v. Baker*, 24 How. (N. Y.) 329. The object of introducing counter-claims into the practice under the Code was, to enable parties to settle and adjust all their cross-claims in a single action as far as they could. *Waddell v. Darling*, 51 N. Y. (6 Sick.) 327.

The views above stated, as to the general properties and office of the counter-claim in New York, were fully approved and adopted in Wisconsin, and it was there held that a counter-claim must be a claim which, if established, will defeat or in some way qualify the judgment to which the plaintiff is otherwise entitled. *Dietrich v. Koch*, 35 Wis. 618. It does not deny the plaintiff's demand, except so far as it is founded upon his possession, but seeks to extinguish it by an equitable cross-action. It is a claim which of itself would constitute a cross-action in favor of the defendant against the plaintiff in a separate suit. *Jarvis v. Peck*, 19 id. 74.

So in Missouri, where the defendant has a cause of action against the plaintiff, upon which he might have maintained a suit, such cause of action is a counter-claim. *Holzbauer v. Heine*, 37 Mo. 443; *Hay v. Short*, 49 Mo. 139.

In Ohio, a counter-claim must contain facts recognized by courts of law or equity as constituting an existing cause of action. *Hill v. Butler*, 6 Ohio St. 207. See, also, *Allen v. Shackelton*, 15 id. 145. But it was held that an answer, however unskillfully and inartificially drawn, containing facts which warrant affirmative relief to the defendant, will

be regarded as a counter-claim. *Wiswell v. First Cong. Church*, 14 id. 31.

In California, a counter-claim has been defined to be a cause of action in favor of the defendant, upon which he might have sued the plaintiff, and obtained affirmative relief in a separate action. *Belleau v. Thompson*, 33 Cal. 495.

In Kentucky, a counter-claim is substantially a cross-action by the defendant against the plaintiff, growing out of, or connected with, the subject-matter of the action. *Slone v. Slone*, 2 Metc. (Ky.) 339. See, also, *Bowen v. Sebree*, 2 Bush (Ky.), 112.

The statute of Indiana defines a counter-claim to be "any matter arising out of, or connected with, the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim for damages." And it is said that the counter-claim comprehends recoupment, and much more. It hardly admits of a question that it embraces also what was known as the cross-bill in equity against the plaintiff. *Woodruff v. Garner*, 27 Ind. 4. And see *Campbell v. Routt*, 42 Ind. 410.

The defense of counter-claim under the Arkansas Code is but the plea of recoupment under the old practice, and, in general, is to be governed by the same doctrines, except that, where the defendant's demand exceeds that of the plaintiff, he may be entitled to a judgment for the excess. *Bloom v. Lehman*, 27 Ark. 489.

In Minnesota, although matter set up in an answer may be a complete defense to the cause of action alleged in the complaint, it may also be pleaded as a counter-claim, if it constitutes a cause of action in favor of the defendant against the plaintiff, and is connected with the subject of the plaintiff's action. *Griffin v. Jorgenson*, 22 Minn. 92.

In a recent case in Pennsylvania it was said that "an independent counter-claim must be such as a jury can find and liquidate, just as if the defendant were plaintiff suing in an action of debt." AGNEW, J., in *Russell v. Miller*, 54 Penn. St. 154.

The distinction between set-off and counter-claim is thus pointed out in Indiana: "A set-off is a separate and independent indebtedness. A counter-claim is that which might have arisen out of, or could have had some connection with, the original transaction, in view of the parties, and which, at the time when the contract was made, they could have intended might in some event give one party a claim against the other for compliance or non-compliance with its provisions." *Conner v. Winton*, 7 Ind. 523; *Lovejoy v. Robinson*, 8 id. 399.

A counter-claim is said to differ from new matter which may be set up in the answer in this: That while the new matter can only be used

to defeat the action, a counter-claim may be used to sustain an action. It is simply a cross-action to enforce a legal or equitable set-off against the plaintiff. *Chamboret v. Cagney*, 41 How. (N. Y.) 125; S. C., 10 Abb. (N. S.) 31.

§ 2. **What demands constitute.** From the definitions given in the foregoing section, it is seen that the counter-claim embraces not only "recoupment of damages" and "set-off," but it was designed to include other demands to which neither of these two terms can apply. In short, it was intended to secure to a defendant all the relief which either an action at law, or a bill in equity, or a cross-bill would have secured on the same state of facts. *Leavenworth v. Packer*, 52 Barb. 132; *Ogden v. Coddington*, 2 E. D. Smith (N. Y.), 317. But a counter-claim, to be available, must have existed in favor of the defendant and against the plaintiff, at the commencement of the action. *Rickard v. Kohl*, 22 Wis. 506; *Orton v. Noonan*, 29 id. 541; *Gage v. Angell*, 8 How. (N. Y.) 335.

In an action to recover for the price of personal property sold, an answer by the defendant setting up a breach of warranty, in respect to the quality of that property and claiming to recoup to that extent, is a counter-claim. *Lemon v. Trull*, 13 How. (N. Y.) 248; *Dounce v. Dow*, 57 N. Y. (12 Sick.) 16; *Earl v. Bull*, 15 Cal. 421; *Hoffa v. Hoffman*, 33 Ind. 172. Under the old system of practice, set-offs sounding in damages for breaches of contract were not allowed, but this objection cannot be maintained in regard to counter-claims. Thus, under the Missouri Code, which provides that "in an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action" may be set up as a counter-claim, it is held that a counter-claim, arising out of any other contracts between the same parties, though sounding in damages, may be set up. *Empire Transp. Co. v. Boggiano*, 52 Mo. 294. But see *Green v. Willard, etc., Co.*, 1 Mo. App. 202. In an action on a promissory note, damages arising from neglect in protesting another note were allowed to the defendant in *Bidwell v. Madison*, 10 Minn. 13. So, in New York, a counter-claim asking for unliquidated damages will be sustained. *Parsons v. Sutton*, 66 N. Y. (21 Sick.) 92. A claim for damages for a violation of a covenant to ship goods in good cases may be set off, by way of counter-claim, in an action brought to recover the price of other goods sold to the defendant. *Wheelock v. Pacific Pneumatic Gas Co.*, 51 Cal. 223. In an action against the keeper of a livery and feed stable, who had been employed by the plaintiff to keep, feed and take care of his horse, to recover for an injury to the horse, occasioned by the bailee's failure to take proper care of him, it was held

that the defendant might set up, by way of counter-claim, an indebtedness of the plaintiff to the defendant for the keeping and taking care of the horse under the contract. *Griffin v. Moore*, 52 Ind. 295. In an action upon the implied agreement to pay for work and labor, the defendant may counter-claim the damages suffered from a breach of the implied agreement that the work shall be skillfully done. *Eaton v. Woolly*, 28 Wis. 628. And where the action was for the recovery of the contract price of building a bridge, the defendant was allowed to counter-claim damages for failure to build it according to contract. *Moore v. Caruthers*, 17 B. Monr. (Ky.) 669. And see *Bishop v. Price*, 24 Wis. 480.

In New York the rule formerly was, that in an action for a tort, a counter-claim, no matter whether arising on contract or based upon another tort, could not be allowed. But this rule has now been so far modified as to allow the interposition of a counter-claim in the full sense of the Code, whether arising on contract or based upon a tort, in an action for a tort, whenever such counter-claim is founded upon a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, *or* whenever it is connected with the subject of the action. As soon as a defendant brings himself within the one or the other of the exceptions made to the general rule, his right to counter-claim is perfect, irrespective of the form of the plaintiff's cause of action as set out in the complaint. *Chamboret v. Cagney*, 41 How. (N. Y.) 125; S. C., 10 Abb. (N. S.) 31; 2 Sweeney, 378.

So, there is but one form of civil action under the North Carolina Code, and any claim arising out of the transaction set out in the complaint may be set up as a counter-claim, whether in tort or contract. *Bitting v. Thaxton*, 72 No. Car. 541. Thus, where the defendant was sued for the conversion of money and property while in the plaintiff's service, he was permitted to counter-claim his wages while so employed. *Id.* So, the defendant was sued for the conversion of a horse and he was permitted to set up the fact that the horse was sold to him by the plaintiff in exchange for some land, that the plaintiff fraudulently deceived him in regard to its location, and to ask for a rescission of the contract of exchange. *Walsh v. Hall*, 66 id. 233.

In an action for damages for withholding the possession of real property, if the defendant held, under color of title, in good faith, adversely to the claim of the plaintiff, taxes paid by him upon the property during such withholding, are a proper subject of counter-claim. *Neff v. Pennoyer*, 3 Sawy. (C. C.) 495. But to enable a defendant to maintain a counter-claim for the value of improvements made upon

the premises of another, it must appear that the improvements are affixed to the freehold and still existing; that they better the condition of the property for the ordinary purposes for which it is used, and that they were made while the defendant, or those under whom he claims, were in possession, under color of title, in good faith, adversely to the claim of the plaintiff. *Id.*; *Stark v. Starr*, 1 id. 15.

An action to foreclose a mortgage given to secure a bond, wherein judgment is asked against the obligor for any deficiency, is, as to the latter, an action arising on contract, and one wherein a several judgment may be had, and hence is subject to a counter-claim of any other cause of action on contract, which such obligor had against the plaintiff at the time of the commencement of the action. *Hunt v. Chapman*, 51 N. Y. (6 Sick.) 555. See, also, *Allen v. Maddox*, 40 Iowa, 124.

It is held to be the law in Wisconsin that, if A commits a trespass against B by laying down B's fences and letting his cattle upon B's land, B may waive the tort and set up a claim for the pasturage of the cattle as a counter-claim, in an action of contract against him by A. *Norden v. Jones*, 33 Wis. 600; S. C., 14 Am. Rep. 782. And it was held in Kentucky that *indebitatus assumpsit* might be maintained for the value of property tortiously taken and converted, and that which might be recovered in such an action may be pleaded as a set-off. *Eversole v. Moore*, 3 Bush (Ky.), 49; *Huddix v. Wilson*, id. 527. And see *Gordon v. Bruner*, 49 Mo. 570. But see *Piser v. Stearns*, 1 Hilt. (N. Y.) 86, where it is held that a claim for the wrongful conversion of a chattel, which is a cause of action arising out of a tort, cannot be set up by way of counter-claim in an action arising upon contract. See, also, *City of New York v. Parker Vein Steamship Co.*, 12 Abb. Pr. 300; S. C., 21 How. 289.

In an action to recover rents under a lease of water-power, the defendant may counter-claim damages arising, before the commencement of the action, from breaches of covenants in the lease (1) for quiet enjoyment, and (2) to raise and maintain the dam, keep it in good repair, and supply the defendants with a certain amount of water. *Orton v. Noonan*, 30 Wis. 611. And it is not a valid reply to such a counter-claim, that the plaintiff has sold the premises since the commencement of the action. *Id.* So, in New York, in an action to recover rent, the lessee has a right to set up, as a counter-claim, damages arising from a breach of an agreement in the lease, on the part of the lessor, to keep the premises in repair. *Cook v. Soule*, 56 N. Y. (11 Sick.) 420. See, also, *Morgan v. Smith*, 5 Hun (N. Y.), 220; S. C. again, 7 id. 244; S. C. affirmed, 70 N. Y. (25 Sick.) 244; *Block v. Ebner*, 54 Ind. 544.

So in an action for rent due upon a verbal lease, the defendant may show that the plaintiff, in making the lease, agreed to build a certain fence, and may counter-claim damages arising from his neglect to build it. *Hay v. Short*, 49 Mo. 139. In an action against an innkeeper for the loss of goods, upon his liability as bailee of the guest's property, the defendant may set up, as a counter-claim, the plaintiff's indebtedness to him for board as such guest. *Harris v. Curet*, 9 Abb. (N. S.) 199. But it is otherwise in an action *ex delicto* against an innkeeper for the loss of the goods of a guest. *Classen v. Leopold*, 2 Sweeney (N. Y.), 705.

A judgment, even though recovered in an action of tort, is a contract within the provisions of the New York Code allowing a claim on contract to be set up as a counter-claim, in any action on contract. The original cause of action is merged in the judgment. *Taylor v. Root*, 4 App. (N. Y.) 382; S. C., 4 Keyes, 335. But see *McCoun v. New York, etc., R. R. Co.*, 50 N. Y. (5 Sick.) 176.

That a judgment obtained by the defendant after the commencement of an action against him may be set up as a counter-claim in such action, see *Vail v. Tuthill*, 10 Hun (N. Y.), 31.

In an action to enforce a right to a name indicating where an established business is carried on, and to restrain its violation, a counter-claim on the part of the defendant alleging that he is himself the owner of the name; that the plaintiff has wrongfully used it, and asking that the plaintiff be restrained from such use, and be required to pay damages for the infringement of the defendant's right thereto, is proper, and if the allegations are sustained the defendant is entitled to the relief sought. It is a cause of action connected with the subject of the action set forth in the complaint, and so falls within the definition of a counter-claim, as given by the New York Code. *G. & H. Manuf. Co. v. Hall*, 61 N. Y. (16 Sick.) 226; S. C., 19 Am. Rep. 278.

In an action for work, a counter-claim that it was done in part performance of a special contract contained in a lease, which was violated in several respects by the plaintiff, was sustained in *Kisler v. Tinder*, 29 Ind. 270. In an action for services in managing the defendant's business, it was held that he might set up as a counter-claim the loss of profits resulting from the neglect of the plaintiff. *Stoddard v. Treadwell*, 26 Cal. 294. In New York it is held that the right to recover money lost by betting or gaming is a demand arising on contract, and may be set up as a counter-claim. *McDougall v. Walling*, 48 Barb. 364. The plaintiff agreed to carry a cargo belonging to the defendant in a canal boat from Rochester to New York, and the plaintiff's boat being frozen up in the canal on the trip was injured by the defendant's

efforts to preserve the cargo. In an action for the injuries so done to the plaintiff's boat, it was held that damages to the cargo, caused by the improper delay of the plaintiff in making the trip, were admissible as a counter-claim. *Starbird v. Barrons*, 43 N. Y. (4 Hand) 200.

In an action upon two promissory notes, the defendant's answer alleged in substance that the notes were given in part payment of a farm sold by the plaintiff's testator to the defendant; that the defendant was induced to purchase by means of false and fraudulent representations as to the territorial extent of the farm; that the territory falsely represented to be embraced in the farm would have enhanced its value more than \$5,000, and that the defendant had sustained damages to more than that amount, and it was held that the answer set up matter constituting a counter-claim. *Isham v. Davidson*, 52 N. Y. (7 Sick.) 237.

In a suit by the grantor to rescind a conveyance of land, on the ground of fraudulent representations, a counter-claim denying the fraud and alleging that the plaintiff has wrongfully kept the defendant out of possession, and asking judgment for possession and for rents and profits, is within the Indiana statute. *Woodruff v. Garner*, 27 Ind. 4.

Where, in an action to foreclose a mortgage, the defendant sets up facts showing that, at the time the mortgage was given, he also gave the plaintiff a deed, which was intended to be a mortgage, to secure a part of the debt for which the mortgage was given, and prays to be permitted to pay the mortgage debt, and have the deed canceled, and the mortgage satisfied of record, the answer is held to constitute a counter-claim, to which a reply is necessary. *Bernheimer v. Willis*, 11 Hun (N. Y.), 16.

In an action by a veterinary surgeon for professional services, the defendant was permitted to counter-claim damages suffered from a breach of a contract of guaranty as to the quality of a team which he had purchased upon the plaintiff's representation. *Williams v. Wieting*, 3 N. Y. Sup. Ct. (T. & C.) 439. And in an action for the price of mill machinery, and for work and labor, the defendant was allowed to counter-claim damages which had accrued from the breach, by revocation, of an arbitration bond. *Curtis v. Barnes*, 30 Barb. 225. And see *Schubart v. Harteau*, 34 id. 447.

So, it has been held in New York that a counter-claim, or defense of an equitable nature, may be interposed, although the claim or demand mentioned in the complaint is purely of a common-law nature, or for the recovery of money only. *Hicksville, etc., R. R. Co. v. Long Island R. R. Co.*, 48 Barb. 355.

§ 3. What demands do not constitute. The defense of usury is
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held not to be a counter-claim within the meaning of the Code, for the reason that such a defense does not seek to establish another claim, counter to the plaintiff's, to apply by way of extinguishment or otherwise against it, but to show merely that the plaintiff's claim has not and never had any legal existence. *Prouty v. Eaton*, 41 Barb. 409. See *Geenia v. Keah*, 66 id. 249; *Equitable Life Ass. Soc. v. Cuyler*, 12 Hun (N. Y.), 247.

Under the Wisconsin statute, which requires, in order to sustain a valid counter-claim, facts on which the defendant might maintain a distinct action against the plaintiff, it was held, that an answer, that the note on which the action was brought had been obtained by fraud, was insufficient therefor. *Resch v. Senn*, 31 Wis. 138. So, where the action was by the payee, against an accommodation indorser of a note, given for machinery to be manufactured for the maker, it was held that the defendant could not counter-claim for damages to the maker of the note, arising out of the defective construction of the machinery. *Hiner v. Newton*, 30 id. 640. Nor can a defendant set up, by way of counter-claim to an action, that such action was brought maliciously, and without probable cause, and claim damages therefor. *Noonun v. Orton*, 30 Wis. 356. And as an action to recover for a wrongful conversion of the proceeds of goods is in the nature of a tort, a counter-claim in contract is not admissible. It is not a demand "connected with the subject of the action," in the sense of the Wisconsin statute. *Scheunert v. Kaehler*, 23 id. 523.

In California, in an action to recover money claimed to be due, the defendant cannot set off, by way of counter-claim, the value of the use and occupation of premises claimed by him, which the defendant entered upon and holds under a third person, and in hostility to the defendant's alleged title. *Quin v. Smith*, 49 Cal. 163. And it is held in the same State, that a claim to recover the possession of distinct and separate chattels cannot be set up as a counter-claim. *Lovensohn v. Ward*, 45 Cal. 8. See, also, *De Leyer v. Michaels*, 5 Abb. Pr. (N. Y.) 203.

The New York statutes relating to the allowance of set-off and counter-claims have no application to proceedings under the statute for the removal of tenants for non-payment of rent, but are solely applicable to actions, and to such actions only as are mentioned in the statutes. Accordingly, where it was shown that a tenant had tendered one-half of the rent due, and had a claim against the landlord for an amount equal to the balance, it was held that such tender and claim did not constitute a legal answer to the affidavit of the landlord that the rent was not paid. *People v. Walton*, 2 N. Y. Sup. Ct. (T. & C.) 533.

So, in an action for rent, it is held that wrongful acts on the part of the landlord, which do not merely constitute a breach of the contract of letting, but are wrongful independently of his obligations under the contract, cannot be set up as a counter-claim. *Edgerton v. Page*, 20 N. Y. (6 Smith) 281. Thus, negligence of the landlord in suffering leakage in a waste pipe, whereby the stock of the tenant was damaged, and he was compelled to forego a renewal of his lease, is not available by way of counter-claim. *Id.* And in an action on a bond for rent, it was held that the defendants could not set up as a counter-claim a demand against the plaintiff, for removing from the premises fixtures placed there by the defendants, but which the lease did not, in terms, authorize, such a demand not arising out of the contract of hiring. *Mayor of New York v. Parker Vein Steamship Co.*, 21 How. (N. Y.) 289; S. C., 12 Abb. 300.

Where an agreement in writing to deliver two separate parcels of merchandise creates two distinct contracts, it is held, in Ohio, that damages for refusal to deliver one parcel cannot be set up, by way of counter-claim, in a suit on a note given for the price of the other. *Loomis v. Eagle Bank*, 10 Ohio St. 327. So, where the holder of an overdue note agrees, for a new and valuable consideration, not to sue the same for a reasonable time, damages for breach of the agreement cannot be set up by way of counter-claim in an action on the note. *Newkirk v. Neild*, 19 Ind. 194.

So, it is held, that in an action on contract it is not admissible to set up as a counter-claim that the plaintiff had fraudulently induced the defendants to pay moneys falsely claimed under the contract, in excess of the true value of the work, and to demand a repayment. To render these facts available as a counter-claim, the tort must be waived, and the recovery of the moneys overpaid be sought, as on an implied contract, and the answer must set forth facts showing the defendant's election to proceed on the implied contract, and not for the wrong. *Berrian v. Mayor, etc., of New York*, 15 Abb. N. S. (N. Y.) 207.

In an action upon a bond the defendant set up, as a counter-claim, an account for professional services rendered the obligee. The plaintiff, in answer to the counter-claim, alleged that the bond was delivered as a full settlement, on a final accounting between the parties. The referee having found that the counter-claim accrued before the accounting took place, it was held to be barred by such settlement and the giving of the bond. *Mount v. Ellingwood*, 2 N. Y. Sup. Ct. (T & C.) 527.

In an action for a limited divorce on the ground of cruelty, the defendant's answer, charging adultery by the plaintiff and demanding

an absolute divorce, is not a proper counter-claim. *Henry v. Henry*, 17 Abb. Pr. (N. Y.) 411; S. C., 3 Robt. 614. Nor, in an action for an absolute divorce on the ground of adultery, is an answer alleging cruelty and praying for a judicial separation, a proper counter-claim. *Terhune v. Terhune*, 40 How. (N. Y.) 258; *Griffin v. Griffin*, 23 id. 183. But see *Armstrong v. Armstrong*, 27 Ind. 186; *McNamara v. McNamara*, 9 Abb. Pr. (N. Y.) 18.

In Minnesota, in an action to enforce a mechanic's lien, an answer alleging that the premises on which the plaintiff seeks to have his demand adjudged a lien formed the defendant's "homestead," and were, therefore, free from all lien or charges in favor of creditors, was held not to be a counter-claim, since it stated no cause of action against the plaintiff. *Englebrecht v. Rickert*, 14 Minn. 140.

It is held in New York, that the counter-claim must contain not only the substance of what is necessary to sustain an action in favor of the defendant against the plaintiff, but it must also operate in some way to defeat, in whole or in part, the plaintiff's right of recovery in the action; and an answer which does not meet this requirement is insufficient, whether regarded as a defense or a counter-claim. See *ante*, p. 530, § 1. If, therefore, a person be sued on a promissory note he cannot set up, by way of defense or counter-claim, a contract with the plaintiff for the purchase of lands, and allege payment of the purchase-price, and claim a decree in the action for specific performance; nor could he, in such action on a promissory note, have a foreclosure of a mortgage against the plaintiff, especially if he were not personally liable for the mortgage debt. *Mattoon v. Baker*, 24 How. 329.

§ 4. **Who may interpose the defense.** Unless the statute contains a provision in favor of sureties or joint debtors, it is the general rule that the counter-claim must be a demand, existing in favor of the defendant who pleads it. The defendant cannot set up and maintain as a valid counter-claim a right of action subsisting in favor of another person. *Bates v. Rosekrans*, 37 N. Y. (10 Tiff.) 409; *Dolph v. Rice*, 21 Wis. 590; *Carpenter v. Leonard*, 5 Minn. 155; *Ernst v. Kunkle*, 5 Ohio St. 520. Thus, a surety, when sued upon his obligation, cannot avail himself of an independent cause of action existing in favor of his principal against the plaintiff as a counter-claim. *Lasher v. Williamson*, 55 N. Y. (10 Sick.) 619. And where one is sued, a demand in favor of himself and a former partner, not the party to the suit, is inadmissible as a counter-claim. *Campbell v. Genet*, 2 Hilt. (N. Y.) 290. Nor is a partnership debt allowable as a counter-claim in an action by one of the partners. *Byrd v. Charles*, 3 So. Car. 352. And to an action against several joint debtors for a debt due by them as part-

ners, one of them cannot avail himself, either by way of set-off or counter-claim, of such a defense. *Peabody v. Bloomer*, 3 Abb. Pr. 353; S. C., 6 Duer, 53. See, also, *Baldwin v. Briggs*, 51 How. (N. Y.) 477; S. C., 53 id. 80. But in an action upon a contract, a balance due the defendant upon an unsettled partnership account between the parties, who had been partners before the commencement of the action, is a proper counter-claim and the defendant can ask for an accounting, and the application of the balance found due him, in extinguishment of the plaintiff's claim. *Clift v. Northrup*, 6 Lans. (N. Y.) 330; *Waddell v. Darling*, 51 N. Y. (6 Sick.) 327. But see *Leabo v. Renshaw*, 61 Mo. 292. In an action by several plaintiffs, on a contract, for an accounting, if the contract itself divides the fund, and makes a specific share due to each, a cause of action in favor of the defendants against one of the plaintiffs, though it could not be set up to bar the right to an accounting, is a proper counter-claim against the share of the plaintiff whom it affects. *Taylor v. Root*, 4 Abb. App. (N. Y.) 382; S. C., 4 Keyes, 335. In Ohio, in an action on a joint debt against principal and surety, a demand due from the plaintiff to the principal alone was allowed to be set off upon equitable grounds. *Wagner v. Stocking*, 22 Ohio St. 297. See *Bookstover v. Jayne*, 60 N. Y. (15 Sick.) 146.

Where the account officers of the treasury, in mistake of law, have certified a balance in favor of a party upon a contract or obligation which was invalid, and the party brings a suit founded upon the same contract, the defendants may set up as a counter-claim, and recover back the money paid on the accounting officer's settlement, *ex æquo et bono*. *McKee v. United States*, 12 Ct. of Cl. 504.

A person sued in a representative capacity, as, for instance, as a receiver to recover trust funds in his hands, or to enforce the performance of his fiduciary duty, cannot avail himself, by way of counter-claim, of a demand due to himself in his personal and private capacity. *Johnson v. Gunter*, 6 Bush (Ky.), 534.

But under the North Carolina statute which allows an equitable defense to be set up against an assignee with notice, a creditor of an estate in administration, who has purchased assets of the estate at an administrator's sale, and given a note for the price, may, in an action upon such note brought by one who purchased it overdue, set up his demand against the estate by way of counter-claim. *Ransom v. McClees*, 64 No. Car. 17.

§ 5. **Against whom.** A counter-claim is a cause of action against the plaintiff. And, unless the facts, if alleged in a separate action against the plaintiff, make out a cause of action against him, they do

not constitute a counter-claim. *Mynderse v. Snook*, 1 Lans. (N. Y.) 488. The application of this rule is most frequently made in actions brought by assignees of the demands in suit; and if the plaintiff be such an assignee, no demand accruing to the defendant against the assignor can be enforced as a counter-claim. *Thompson v. Sickles*, 46 Barb. 49; *Vassear v. Livingston*, 13 N. Y. (3 Kern.) 248; *McConihe v. Hollister*, 19 Wis. 269; *Linn v. Rugg*, 19 Minn. 181. But see *Perry v. Chester*, 12 Abb. Pr. (N. S.) 131; *Page v. Ford*, 12 Ind. 46. So, the demand must not only be against the plaintiff, but it must also be against him in the capacity in which he sues. Thus, if the action is brought by the plaintiff in his private and personal capacity, a claim against him as an executor or an administrator cannot be set up as a valid counter-claim. See *Merritt v. Seaman*, 6 Barb. 330; *Patterson v. Patterson*, 59 N. Y. (14 Sick.) 574; S. C., 17 Am. Rep. 384; *Westfall v. Dungan*, 14 Ohio St. 276. The Code of Civil Procedure of New York provides for a counter-claim against the person whom the plaintiff represents. N. Y. Code of Civ. Proced., § 501.

When a receiver, trustee, executor, or administrator, sues to recover a debt due to the estate, a demand by the defendant for services rendered on behalf of the estate on the plaintiff's employment is a good counter-claim. *Davis v. Stover*, 58 N. Y. (3 Sick.) 473.

As against the State, it is held that the counter-claim can be used as a defense, but no further. *Commonwealth v. Todd*, 9 Bush (Ky.), 708.

In actions by married women to recover demands due to them personally as a part of their separate property, or their personal earnings, and the like, the debts and liabilities of their husbands cannot be successfully interposed as counter-claims. *Paine v. Hunt*, 40 Barb. 75.

And it was held in Kentucky, in a suit by a widow to recover dower in land conveyed by her husband during the marriage without her release, that the defendant could not counter-claim damages arising from the breach of a covenant of warranty in the husband's deed. *Hill v. Golden*, 16 B. Monr. (Ky.) 551.

§ 6. **Election as to interposing.** In the absence of a statutory prohibition, the defendant has an election to set up his cause of action as a counter-claim, or to prosecute it in a separate action brought for that purpose. Thus, in New York, except in cases commenced in a justice's court, a party having a demand against another can maintain an action therefor, although at the time an action is pending against him by the same party, wherein he could have set up such demand as a counter-claim. *Inslee v. Hampton*, 8 Hun (N. Y.), 230. And see *Welch v. Hazelton*, 14 How. (N. Y.) 97; *Gillespie v. Torrence*, 25 N. Y. (11

Smith) 306, 308. But it is otherwise under the Minnesota Code. *Lowry v. Hurd*, 7 Minn. 356, 363.

§ 7. **How interposed.** A counter-claim must be pleaded. *Bucknam v. Brett*, 13 Abb. Pr. (N. Y.) 119, 123; S. C., 22 How. 233; 35 Barb. 596. But no particular form of words is necessary to make a pleading a counter-claim; if the defendant intimate, in any reasonable language, his intention to make a personal claim in his own favor against the plaintiff, it will be sufficient. The ordinary and most satisfactory form of giving that intimation is, by a statement that the pleading is a counter-claim, and praying for the affirmative relief sought. *Bates v. Rosekrans*, 37 N. Y. (10 Tiff.) 409; S. C., 4 Abb. (N. S.) 276. See, also, *Simmons v. Kayser*, 11 Jones & Sp. (N. Y.) 131; *Quinn v. Smith*, 49 Cal. 163. In Wisconsin, no averment in an answer will be held to constitute a counter-claim unless it is so denominated, and the appropriate relief prayed. *Stowell v. Eldred*, 39 Wis. 614.

But it is held in Indiana, that where it appears from the facts alleged in an answer, that it contains a statement of new matter arising out of or connected with the cause of action, which might be the subject of an action in favor of the defendant, this need not also be directly averred, to constitute a counter-claim. *Gilpin v. Wilson*, 53 Ind. 443. See, also, *McMannus v. Smith*, id. 211.

In an action brought to recover the amount found due for work and labor, an answer setting up a cause of action *ex delicto* against the plaintiff for damages, does not constitute a counter-claim in Minnesota. *Steinhart v. Pitcher*, 20 Minn. 102.

A counter-claim for permanent improvements should not be pleaded to the whole complaint, but only to so much thereof as to which it is an answer or defense. And it should allege the present value of such improvements, and that they better the condition of the property for the ordinary purposes for which it is used. *Wythe v. Myers*, 3 Sawyer (C. C.), 595.

§ 8. **Judgment on.** A counter-claim is an affirmation of a cause of action against the plaintiff in the nature of a cross action, and upon which the defendant may have an affirmative judgment against the plaintiff. *Fettretch v. McKay*, 47 N. Y. (2 Sick.) 426; S. C., 11 Abb. (N. S.) 453. Under the New York Code of Civil Procedure, "Where a counter-claim is established, which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff. Where part of the excess is not due

from the plaintiff, the judgment does not prejudice the defendant's right to recover, from another person, so much thereof as the judgment does not cancel." Code Civ. Proc., § 503. And see *Moore v. Caruthers*, 17 B. Monr. (Ky.) 669; *Hay v. Short*, 49 Mo. 139. The foregoing provisions presuppose that both demands are for the recovery of money, either debt or damages; and where the plaintiff's cause of action, or the counter-claim, is for the recovery of some special relief, legal or equitable, the judgment rendered must be according to the circumstances of the case. See *id.*; N. Y. Code Civ. Proc., § 504.

In Ohio, where the amount claimed by the plaintiff in his petition is admitted, and the only issues in the case arise on the defendant's counter-claim, the jury may, subject to the direction of the court, in assessing damages on the counter-claim, deduct the amount admitted to be due the plaintiff. If they make such deduction, their verdict ought to show it, and if the deduction is not made by the jury, it will be made by the court in rendering the judgment. *Brainard v. Lane*, 26 Ohio St. 632.

A defendant is as much concluded by the amount of damages he claims in his counter-claim, as a plaintiff would be by the damages claimed in his complaint. *Annis v. Upton*, 66 Barb. 370.

ARTICLE IV.

RECoupMENT.

Section 1. Definition. It is well settled upon common-law principles, that where the defendant has sustained damages by reason of the plaintiff's non-performance of his part of the agreement sued on, such defendant has the right to abate the plaintiff's verdict by the amount of such damages; and the damages to which the defendant is entitled, in abatement of the claim against him in such case, are what he might recover in a cross action by him, against the plaintiff, for the non-performance of his portion of the agreement. *Overton v. Phelan*, 2 Head (Tenn.), 445. Such is the doctrine of "recoupment of damages," which is not novel, but is as ancient as the common law. The doctrine rests on the principle, that it is always desirable to prevent a cross action, when full and complete justice can be done in a single suit; and it is on this ground that the courts have been disposed to extend to the greatest length, compatible with the legal rights of the parties, the principle of allowing evidence in defense or in reduction of damages to be introduced, rather than to compel the party to resort to his cross action. *Harrington v. Stratton*, 22 Pick. 510; *Dorr v. Fisher*, 1 Cush. 271; *Houston v. Young*, 7 Ind. 200; *Grand Lodge v. Knox*,

20 Mo. 433; *Stow v. Yarwood*, 14 Ill. 424. The doctrine is but a liberal and beneficent improvement upon the old doctrine of failure of consideration. It looks through the whole contract, treating it as an entirety, and treating the things done and stipulated to be done on each side, as the consideration for the things done or stipulated to be done on the other. *Lufburrow v. Henderson*, 30 Ga. 482. Again, it is said that the right of a defendant in a proper case, and under a proper state of pleadings, to reduce by way of recoupment the damages sought to be recovered by the plaintiff, is so reasonable in itself, so necessary to the simple and economical administration of justice, and so entirely congenial to our system of jurisprudence, that it has in general commended itself to the courts. *Steamboat Wellsville v. Geisse*, 3 Ohio St. 333; *Upton v. Julian*, 7 id. 95. And again, that the rule is one of obvious equity, and is susceptible of ready and convenient application, and prevents a needless multiplicity of suits. *Fowler v. Payne*, 49 Miss. 32.

In regard to the distinction between recoupment and set-off, it is to be observed that the former is contra-distinguished from the latter in these three essential particulars: *First*. In being confined to matters arising out of and connected with the transaction or contract upon which the suit is brought; *Second*. In having no regard to whether or not such matter be liquidated or unliquidated; and *Third*. That the judgment is not the subject of statutory regulation, but is controlled by the rules of the common law. *Myers v. Estell*, 47 Miss. 4. See, also, *Stow v. Yarwood*, 14 Ill. 424; *Mason v. Heyward*, 3 Minn. 182. As to the distinction between "recoupment" and "counter-claim, see *Kneedler v. Sternbergh*, 10 How. (N. Y.) 67. And see *ante*, p. 530, Art. 3, § 1.

§ 2. **What demands may be recouped.** In the earlier period of the law, the doctrine of recoupment was of very limited application, and it was supposed that there could only be a recoupment where some fraud was imputed to the plaintiff in relation to the contract on which the action was founded. See *Myers v. Estell*, 47 Miss. 4, 23; *Ward v. Fellers*, 3 Mich. 281. But it is now well settled that the doctrine is also applicable where the defendant imputes no fraud, and only complains that there has been a breach of the contract on the part of the plaintiff. *Batterman v. Pierce*, 3 Hill, 171. The American cases, at least, in many of the States, go to the full length of declaring that all matters of counter-claim arising out of the same transaction and not technically the subject of set-off, can be set off by way of recoupment of damages, provided the plaintiff has been properly apprised of the defense. *Ives v. Van Epps*, 22 Wend. 155; *Dodge v. Tileston*,
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12 Pick. 329; *Hatchett v. Gibson*, 13 Ala. 587; *Grand Lodge v. Knox*, 20 Mo. 433. So, it is held in England, that in all cases of goods sold and delivered with warranty, and work, and labor, as well as the case of goods agreed to be supplied according to a contract, the rule is established, that it is competent for the defendant simply to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of contract. *Mondel v. Steel*, 8 Mees. & W. 858. And see *Basten v. Butter*, 7 East, 479; *Street v. Blay*, 2 B. & Ad. 456. In short, recoupment will, in general, be allowed whenever an action for damages arising out of the subject-matter of the suit can be sustained. Courts will favor recoupment rather than drive a party to a separate action. *Peck v. Brewer*, 48 Ill. 54; *Houston v. Young*, 7 Ind. 200; *Martin v. Hill*, 42 Ala. 275.

Thus, in actions of assumpsit to recover damages for the breach of an agreement, it is well settled that the defendant may set up, by way of recoupment, under a proper notice, that the plaintiff has violated the same agreement and thus defeat a recovery for more than the balance. *Fowler v. Payne*, 49 Miss. 32. See, also, *Earl v. Bull*, 15 Cal. 421; *Upton v. Julian*, 7 Ohio St. 95; *Andrews v. Eastman*, 41 Vt. 134; *Rogers v. Humphrey*, 39 Me. 382; *Satchwell v. Williams*, 40 Conn. 371; *Robertson v. Davenport*, 27 Ala. 574. In an action for lumber used in building the defendant's house, which was delivered under an agreement that it should be furnished as fast as wanted, it being understood that the plaintiff depended for lumber on certain saw-mills in the neighborhood, it was held that the defendant might recoup the damages he had sustained by the failure of the plaintiff to furnish the lumber according to the contract. *Eddy v. Clement*, 38 Vt. 486. See *Miller v. Mariners' Church*, 7 Me. 51. In an action for the price of goods sold which the vendor agreed to deliver free of charge, it was held that the vendee might deduct the government duties paid by him which were required to be paid before the delivery of the goods, and which were, therefore, a charge on the goods while they were the property of the vendor. *Fitch v. Archibald*, 29 N. J. Law, 160. One hiring himself out to do a particular sort of labor upon representing himself to be skillful therein, if he fail to use such skill the employer may recoup the damages resulting to him from such failure, to the full amount claimed by the employee in an action to recover for his labor. *De Witt v. Cullings*, 32 Wis. 298. And it is held that a distinct refusal to perform a contract will support a claim of recoupment therefor, without waiting for the time of performance. *Platt v. Brand*, 26 Mich. 173. So, where a building contract is not performed according to its terms, the owner may recoup the damages arising therefrom

in a suit for the price, although he may have done acts amounting to an acceptance of the building. *Estep v. Fenton*, 66 Ill. 467. See, also, *Cassidy v. LeFevre*, 57 Barb. 313; S. C. affirmed, 45 N. Y. (6 Hand) 562. In an action to recover the price of a bridge which the plaintiff had built for the defendants, they were allowed to prove in defense, that it was so badly built as to be worthless. *Taft v. Montague*, 14 Mass. 282.

Where the vendor of a warranted article, whether it be a specific chattel or not, sues for the price or value, it is competent for the purchaser, in all cases, to prove the breach of warranty in reduction of the damages. *Cook v. Moseley*, 13 Wend. 277; *Owens v. Sturges*, 67 Ill. 366; *Mondel v. Steel*, 8 Mees. & W. 858. And the sum to be recovered for the price of the article will be reduced by so much as the article was diminished in value by the non-compliance with the warranty. *Id.*; *Murray v. Carlin*, 67 Ill. 286; *Williams v. Miller*, 21 Ark. 469; *Love v. Oldham*, 22 Ind. 51. But when the defendant, in an action for the price of an article, relies upon breach of warranty, the burden of proof is on him to show that the article does not correspond with the warranty. *Dorr v. Fisher*, 1 Cush. 271. If, however, the goods are sold by sample, and the vendee refuses to accept them, on the ground that they do not correspond with the sample, the burden of proof is on the vendor, in an action by him for the price, to show that the quality was not inferior to the sample. *Merriman v. Chapman*, 32 Conn. 146. See Vol. 5, p. 527, tit. *Sale*.

It is not necessary that the opposing claims should be of the same character in order that they may be adjusted in one action by recoupment. A claim originating in contract may be set up against one founded in tort, if the counter-claims arise out of the same subject-matter, and are susceptible of adjustment in one action. And the converse of this proposition is true, that damages for a tort, in relation to the same subject-matter on which the suit on the contract is brought, may be adjusted in that action by recoupment. *Henion v. Morton*, 2 Ashm. (Penn.) 150; *Streeter v. Streeter*, 43 Ill. 155; *Waterman v. Clark*, 76 id. 428. And see *Allaire Works v. Guion*, 10 Barb. 55. In an action to recover for services as a housekeeper, and for goods sold and delivered, the defendant was permitted to prove, by way of defense, that the plaintiff was guilty of malfeasance in the execution of her trust, and embezzled the goods of the defendant. *Heck v. Shener*, 4 Serg. & R. (Penn.) 248. And in an action by an attorney or surgeon for services, the defendant may recoup for the damages resulting from the plaintiff's want of skill. *Hopping v. Quin*, 12 Wend. 517; *Gleason v. Clark*, 9 Cow. 57. And it was held in Massachusetts,

that, in an action of tort for false and fraudulent representations of the defendant, in exchanging horses with the plaintiff, concerning the horse which he delivered to the plaintiff in the exchange, the defendant may recoup damages for like representations made to him in the transaction, by the plaintiff, concerning the other horse. *Carey v. Guillow*, 105 Mass. 18; S. C., 7 Am. Rep. 494. But in an action to recover damages for a tort, the defendant cannot set up, as a counterclaim or recoupment of damages, an independent tort committed by the plaintiff and not connected with the transaction upon which the plaintiff's right of action is founded. *Murden v. Priment*, 1 Hilt. (N. Y.) 75. The general rule is, that in order to be a subject of recoupment, the defendant's claim must arise out of the cause of action involved in the plaintiff's suit. *Hubbard v. Rogers*, 64 Ill. 434; *Walker v. McCoy*, 34 Ala. 659.

As it respects fraud in the sale of personal property, it is the general rule, that any false representation made, at or before the execution of a contract of sale, as to the value of goods sold, intended and operating as an inducement to the purchase, whether made innocently or fraudulently, by which the vendee sustained loss, is a ground for the recoupment of damages in an action on the contract, on special plea. *Hogg v. Cardwell*, 4 Sneed (Tenn.), 151. See, also, *Burton v. Stewart*, 3 Wend. 236; *Whitney v. Allaire*, 4 Denio, 554; S. C. affirmed, 1 N. Y. (1 Comst.) 305; *Lexow v. Julian*, 14 Hun (N. Y.), 152; *Heastings v. McGee*, 66 Penn. St. 384.

The following recent decisions of a miscellaneous character will serve to illustrate the application of the doctrine of recoupment to a great variety of cases. Thus, it is held, that damages upon a promissory note, and upon breach of an agreement which is the consideration thereof, may be recouped against each other. *Hill v. Southwick*, 9 R. I. 299; S. C., 11 Am. Rep. 250. In a suit on a note given by the purchaser of land for the purchase-money, the defendant may recoup the value of a crop taken from the land by the vendor after the sale. *Gordon v. Bruner*, 49 Mo. 570. It is held in Georgia, that where an agent and overseer sues his employer on an open account, it is competent for the defendant to prove and to recoup the damages sustained by him in consequence of the failure of the plaintiff to enforce the provisions of the contract made by him as the agent of the defendant with the freedmen. *Lee v. Clements*, 48 Ga. 128. See, also, *Brunson v. Martin*, 17 Ark. 270. In an action by the vendor, to recover the price of goods sold and only delivered in part, the purchaser may recoup any damages sustained by him by reason of the failure or refusal to deliver the residue. *Harralson v. Stein*, 50 Ala. 347. See,

also, *Finney v. Cadwallader*, 55 Ga. 75. In an action upon a promissory note given in payment for land conveyed with covenant against incumbrance, the defendant can recoup what he has been compelled to pay to free the land from incumbrance. *Davis v. Bean*, 114 Mass. 358. See, also, *McDowell v. Milroy*, 69 Ill. 498; *Brodie v. Watkins*, 31 Ark. 319. In Illinois, in a suit to recover an installment of rent due on a lease, the defendant may recoup damages he may have sustained in consequence of any breach of the covenants in the lease, on the part of the plaintiff. *Pepper v. Rowley*, 73 Ill. 262. See, also, *Burroughs v. Clancey*, 53 id. 30. And in an action to recover the value of the use of a division fence, under an alleged promise to pay, the defendant may recoup damages sustained from the plaintiff's stock breaking into his premises, through defects in the division fence. *Scott v. Kenton*, 81 id. 96. In an action by a lessee of a coal mine against the lessor, to recover the value of tools taken by the lessor, on resuming possession for non-fulfillment of the terms of the lease, it was held that the lessor could recoup damages for the lessee's unskillful working of the mine, in violation of the covenants in the lease. *Williams v. Schmidt*, 54 Ill. 205.

In Arkansas it is held, that a defendant may recoup the damages sustained by failure of consideration, as well where the action is brought on a promissory note given for the purchase-money, on a contract of bargain and sale, as where it is brought upon the original contract. *Key v. Henson*, 17 Ark. 254. And so held in Kentucky. *Miller v. Gaither*, 3 Bush (Ky.), 152.

And it is held that, if the plaintiff sue on one part of a contract, consisting of mutual stipulations made at the same time, and relating to the same subject-matter, the defendant may recoup damages arising from the breach of another part. And this, whether the different parts are contained in one instrument or in several, and whether one part is in writing and the other by parol. *Branch v. Wilson*, 12 Fla. 543; *Mell v. Moony*, 30 Ga. 413. And where the defendant claims to recoup damages resulting from the non-fulfillment of the plaintiff's contract, it is competent for him to show what efforts he made to prevent damages to the plaintiff. *Methodist Church v. Ladd*, 22 Mich. 280.

But it seems that a defendant cannot, under the general issue, in order to reduce damages, show a breach by the plaintiff, of stipulations independent of those on which the plaintiff claims to recover, even though they are included in the same contract on which the suit is brought. *Keyes v. Western Vt. Slate Co.*, 34 Vt. 81.

Damages for breach of contract in not building a house within a specified time may be given in evidence against the plaintiff's demand

for work, labor and services in building. *Abbott v. Gatch*, 13 Md. 314; *Tayloe v. Sandiford*, 7 Wheat. 13; *Rockwell v. Daniels*, 4 Wis. 432. And in an action to recover for services rendered as a farm laborer, the defendant may recoup damages sustained by the failure of the plaintiff to cultivate the land in good season, and in a proper manner. *Houston v. Young*, 7 Ind. 200. See, also, *Cilley v. Tenny*, 31 Vt. 401. But in an action upon a contract to employ a farm servant for a year, at stipulated wages, it appearing that the employee had staid the year out, it was held that the employer could not give in evidence that the employee was lazy, and trifling, and made a poor crop. *Hobbs v. Riddick*, 5 Jones' (No. Car.) L. 80.

Where, in an action for work and labor, it appeared that the work was commenced under a special contract, which the plaintiff failed to perform at the day, but that after such failure the defendant consented to let the plaintiff go on and finish the work, which he did, it was held that though this modification of the contract operated to enable the plaintiff to recover on a *quantum meruit*, it did not amount to a waiver of damages for failing to perform at the day, and that the defendant might, therefore, recoup such damages. *Barber v. Rose*, 5 Hill, 76. Otherwise, had the modification taken place before the time of performance fixed by the special contract. *Id.*

The fact that a party was present giving directions during the erection of his house, built on his own land, making no objections and finally accepting it, does not preclude him from recouping the damages for bad workmanship, in an action for the price, where it does not appear that the defendant did or was able to know of the defects before his final acceptance. *Mitchell v. Wiscotta*, 3 Iowa, 209. And see *Estep v. Fenton*, 66 Ill. 467.

In an action against a jeweler for damages for using base metal in making for the plaintiff articles for which he supplied pure metal, it was held that the defendant might recoup from the value of the pure metal and the amount paid him for his services, the value of the articles which were kept by the plaintiff. *Harris v. Bernard*, 4 E. D. Smith (N. Y.), 195. And see *Krom v. Levy*, 1 Hun (N. Y.), 171; S. C., 47 How. 97; 3 N. Y. Sup. Ct. (T. & C.) 704.

Where a horse hired to perform a journey agreed on, becomes sick or lame, without any fault on the part of the hirer, so that he is unable to travel, and the hirer is thereby compelled to incur expenses in consequence thereof, in order to get home, such expenses may be recouped against the demand of the bailor, for the hire of the horse. *Harrington v. Snyder*, 3 Barb. 380. But expenses incurred by the hirer in successfully defending an action of

trover by the bailor for the conversion of the thing hired, cannot be recouped against a note given for the hire. *Deens v. Dunklin*, 33 Ala. 47.

A claim for damages, by way of recoupment, for a neglect of duty by a ship-owner, under a charter-party, may be set up by the hirer of the vessel against a libel brought by the ship-owner for demurrage under that charter-party. 1 Sprague (Dist. Ct.), 361. And in a suit by a carrier for freight, the defendant may set up in defense damage to the goods. *Bearse v. Ropes*, id. 331. See, also, *Snow v. Carruth*, id. 324; *Bancroft v. Peters*, 4 Mich. 619; *Hinsdell v. Weed*, 5 Denio, 172.

But in an action for freight, the defendant cannot recoup the amount of a premium of insurance paid by him, which insurance he effected by reason of a deviation of the ship on her voyage, the goods having been safely delivered, and no damage being shown to have resulted from delay. *Nye v. Ayres*, 1 E. D. Smith (N. Y.) 532.

In *Farnsworth v. Garrard*, 1 Camp. 38, it was laid down as a settled rule that, in an action for services, the plaintiff's negligence may be proved against him to reduce the amount of his demand, and if there was no beneficial service, there should be no pay. And see, in support of this rule, *White v. Chapman*, 1 Stark. 113; *Montriau v. Jeffreys*, 2 Carr. & P. 113; *Dodge v. Tileston*, 12 Pick. 328; *Phelps v. Paris*, 39 Vt. 511; *Sterrett v. Houston*, 14 Tex. 153; *Runyan v. Nichols*, 11 Johns. 547. But see *Shaw v. Arden*, 9 Bing. 287, holding that where work done by an attorney for his client is partly useless, or where there has been in respect to it negligence, the client's remedy is only by a cross action. On the other hand, in an action to recover wages earned by the plaintiff as master of the defendant's sloop, the defendant offered to prove, by way of recoupment of damages, loss sustained by him through the carelessness of the plaintiff, and it was held that he might do so, the court observing, that the law implied an obligation on the side of the plaintiff, as parcel of the contract in question, to exercise ordinary care in the defendant's service, and damages for not fulfilling that obligation are properly admissible in abatement. *Still v. Hall*, 20 Wend. 51.

If the owner of property delivers it to his creditor, as security for a debt, but reserves the exclusive right to determine when and how it shall be sold, and the creditor sells it without the knowledge and consent of the owner, in an action by the owner against the creditor for money had and received, the creditor may recoup the amount of the debt for which the property was pledged. *Belden v. Perkins*, 78 Ill.

449. And the same rule would apply if the suit was against the purchaser of the property. *Id.*

Where, to an action on a contract, the defendant seeks to recoup the damages resulting from the plaintiff's failure to comply with his obligation thereunder, and the evidence is conflicting as to whether such damages resulted from the default of the plaintiff or of the defendant, or of both, the jury may take into consideration the conduct of both parties, and make their verdict accordingly. *Hill v. Sibley*, 56 Ga. 531.

§ 3. **What cannot.** In an action for the price of land sold, the purchaser may set up in defense the fact that the vendor defrauded him by false representations as to the quantity, quality, condition, boundaries or other matter injuriously affecting the subject-matter of the contract (*McHardy v. Wadsworth*, 8 Mich. 349; *Goodwin v. Robinson*, 30 Ark. 535; *Abercrombie v. Owings*, 2 Rich. (So. Car.) 127; *Myers v. Estell*, 47 Miss. 4); the partial failure of consideration, in such case, being a proper subject of recoupment. But it is believed to be the better opinion, that this defense cannot, in general, be made where the partial failure relates to the title to real estate merely (*Id.*; *Wheat v. Dotson*, 12 Ark. 699; *Hammatt v. Emerson*, 27 Me. 308); the party's remedy is in equity. *Id.*; *Key v. Henson*, 17 Ark. 254. It has, however, been held in Minnesota, that if a mortgage be given for the purchase-money of land, and an action be brought to foreclose it, damages for the breach of the covenant of seizin may be set up. *Lowry v. Hurd*, 7 Minn. 356.

In an action for rent upon a lease giving the landlord the privilege to enter on the premises during the term, to make repairs, the tenant cannot recoup the damages sustained by him through the negligent and tortious behavior of the landlord and his servants in making such repairs. The injury in such case does not arise from the breach of any covenant or stipulation of the landlord, nor does it grow out of the terms or consideration of the contract entered into between the parties. It is as distinct and independent a wrong as any committed upon the tenant by a stranger. *Cram v. Dresser*, 2 Sandf. (N. Y.) 120. See, also, *Walker v. Shoemaker*, 4 Hun (N. Y.), 579; *Elliott v. Aiken*, 45 N. H. 30. So, it is held in Massachusetts, that damages to a lessee by the lessor's trespasses on the premises cannot be set up by way of recoupment for the rent reserved. *Bartlett v. Farrington*, 120 Mass. 284. The two causes of action are independent and do not arise out of the same contract or cause of action, within the principle which allows a recoupment. *Id.* And in an action for rent, it was held that the tenant could not recoup damages from trespasses by the landlord's

cattle, although the latter had promised to pay for such injuries, if the former would not hurt the cattle. *Halme v. Brown*, 3 Heisk. (Tenn.) 679.

In an action of forcible entry and detainer, brought by a cropper against his lessor, the lessor cannot set up a breach of the contract of letting by way of recoupment. *Johnson v. Hoffman*, 53 Mo. 504.

In an action on account for building a fence, it was held that the defendant could not set up in recoupment damages suffered by reason of cattle breaking through the fence; such damages being deemed too remote. *Turner v. Gibbs*, 50 Mo. 556. And in an action on an agreement for the sale and conveyance of land, the vendee cannot defalk from the purchase-money on account of a public road thereon. *Peck v. Jones*, 70 Penn. St. 83.

In an action of assumpsit to recover the amount of a due bill, the defendant cannot recoup or set off damages resulting from the wrongful act of the plaintiff in seizing and detaining the defendant's cattle, and causing the defendant to search for them. *Hart v. Francis*, 2 Col. T. 719.

A vendee in a lumbering contract, who has failed to make advances according to his contract, cannot, when sued by his vendor on the *quantum valebat*, for logs delivered and appropriated, recoup damages for the non-delivery of logs, which, by such default, the vendor was disabled from delivering. *Chapman v. Dease*, 34 Mich. 375.

In an action by an employee against his employer for wages due, the latter cannot recoup unliquidated damages arising from an act of the employee outside of the line of his duty, as for instance, damages to a railway company from the act of a driver of a switch engine in taking it without signal light on a foggy morning upon relief duty in compliance with the orders of a yardmaster, given contrary to the company's regulations known to the driver. *Nashville, etc., R. R. Co. v. Chumley*, 6 Heisk. (Tenn.) 325.

When a party has probable cause for instituting a suit in which he fails, the taxable costs are the measure of the defendant's damages for the institution and prosecution thereof. If suit be brought without such cause, a suit for malicious prosecution is the remedy, and such claim is not the proper subject of recoupment or set-off in a suit subsequently brought upon a contract, in violation of which the former suit was brought. *Sampson v. Warner*, 48 Vt. 247.

§ 4. **Who may recoup.** See *ante*, Art. 3, § 4, p. 540. It has been held that a matter of recoupment can only be used as a defense where it exists in favor of the defendant against the plaintiff in the action. *Cummings v. Morris*, 25 N. Y. (11 Smith) 625; *Duncan v. Stanton*,

30 Barb. 533. But in an action by the assignee against the maker of a promissory note given in payment of the last installment of the purchase-money of land conveyed by warranty deed, it was held that the defendant might recoup a sum which he had been compelled to pay to remove an incumbrance covered by the warranty. *Stillwell v. Chap-pell*, 30 Ind. 72. See *Brown v. Crowley*, 39 Ga. 376.

And in an action on a promissory note, given by principal and surety on a contract of the principal, it is competent to recoup the damages of the principal growing out of the contract, to the same extent as if the note had been given by the principal, and he alone were sued. *McHardy v. Wadsworth*, 8 Mich. 350; *Waterman v. Clark*, 76 Ill. 428.

When an action is brought by one partner against another for money loaned upon a contract distinct from the contract of partnership, the defendant cannot recoup damages growing out of the partnership transactions. *Taylor v. Hardin*, 38 Ga. 577.

And where the plaintiff repaired for the defendants certain machines originally made by a firm of which the plaintiff had been a member, it was held that the defendants could not have deducted, from the cost of the repairs, any thing on account of defects in the original construction of the articles. *Fessenden v. Forest Paper Company*, 63 Me. 175.

§ 5. **Against whom.** See *ante*, p. 541, § 4; also, Art. 3, § 5. In New York, in an action by a surety against his co-surety for contribution, it is held that the latter cannot defend by setting up, by way of counter-claim, recoupment or set-off, a cause of action existing in favor of the principal against the plaintiff. *O'Blenis v. Karing*, 57 N. Y. (12 Sick.) 649.

§ 6. **Election as to setting up.** See *ante*, p. 542, Art. 3, § 6. We have seen from the preceding sections that as a general doctrine, where fraud has accrued in obtaining, or in the performance of contracts, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these objections may be relied upon in defense by a party when sued upon such contracts; and that he shall not be driven to assert them, either for protection or as a ground for compensation in a cross action. See, also, *Withers v. Greene*, 9 How. (U. S.) 213. But a party has his election, and is not bound to insist upon a claim to damages for breach of a warranty, when sued for the price of an article warranted; and his omission to do so is no bar to an action afterward brought by him. *Cook v. Moseley*, 13 Wend. 277; *Batterman v. Pierce*, 3 Hill, 171. Even the pendency of another action, in favor of the defendant against the plaintiff, for the

recovery of damages for breach of contract, will not prevent a recoupment of the same damages by way of defense to a subsequent action, brought by the plaintiff against such defendant upon the same contract. *Naylor v. Schenck*, 3 E. D. Smith (N. Y.), 135. But the defendant may be put to his election either to proceed in the suit he has instituted, or to confine himself to his recoupment. If he elect the former, then he may be prohibited from setting up the same matter; if the latter, then the proceedings in the former action may be stayed. *Fabbricotti v. Launitz*, 3 Sandf. (N. Y.) 743.

And it was held in a comparatively recent case in North Carolina that where an action can be maintained upon the special contract, the defendant is not at liberty to reduce the damages by showing that the property was unsound, and relying upon a warranty or a deceit, or by showing that the articles were of an inferior quality, or that the work done was defective, or that the services contracted for were only partially rendered. *Hobbs v. Riddick*, 5 Jones' (No. Car.) Law, 80. See, also, *Gifford v. Curvill*, 29 Cal. 589. On the other hand, it is well settled in Connecticut that a vendee of personal property warranted need not sue upon the warranty, but may reduce the vendor's damages in a suit brought for the price, by showing how much less the property was worth by reason of the defect warranted against. *Hitchcock v. Hunt*, 28 Conn. 343.

§ 7. **How interposed.** As recoupment signifies nothing more than a reduction of damages, the right can in general only be exercised under a special notice, and not under a plea which purports to be a bar to the action. *Birdsall v. Perego*, 5 Blatchf. (C. C.) 251; *Steamboat Wells-ville v. Geisse*, 3 Ohio St. 333; *Upton v. Julian*, 7 id. 95; *Nichols v. Dusenbury*, 2 N. Y. (2 Comst.) 283. Thus, in an action for wharfage, it was held that if the defendants were entitled to a deduction by way of recoupment, in consequence of the basin being so much out of repair as seriously to diminish the beneficial use of it, notice to that effect should have been given with the plea. And it was observed that "the notice was an essential part of the rule, and could not be dispensed with without leading to surprise and injustice." NELSON, C. J., in *Mayor of Albany v. Trowbridge*, 5 Hill, 71; S. C. affirmed, 7 id. 429. And see *Hills v. Bannister*, 8 Cow. 31; *Gleason v. Clark*, 9 id. 57. A total and entire failure of consideration, on the ground of fraud or otherwise, may, however, be given in evidence under the general issue without notice. But a partial failure cannot be given in evidence without special notice, since it does not go to the foundation of the action, and show that the plaintiff is not entitled to recover any thing, but is merely in mitigation of damages. *People v. Niagara Common Pleas*, 12 Wend

246. So, the rule as to notice as laid down by the court in the English case of *Basten v. Butter*, 7 East, 479, was that "where a specific sum has been agreed to be paid, notice ought to be given; otherwise, the plaintiff would have ground to complain of surprise, if evidence were allowed to show that the work and materials were not worth as much as was contracted to be paid. But that on a *quantum meruit*, the plaintiff must come prepared to show that the work done was worth so much, and, therefore, there could be no injustice to him in suffering this defense to be entered into without notice."

It was held in Illinois, in an action for goods sold and delivered, that the defendant, under the general issue, might prove the facts out of which a warranty arose, the breach, and his damages by way of recoupment. *Babcock v. Trice*, 18 Ill. 420.

Under the New York Code, where, in an action upon a promissory note, the answer alleges facts sufficient to constitute a defense of want of consideration, or a recoupment of damages, it is not necessary for the defendant to state which he will rely upon; and if he so states, he will not be precluded from insisting upon any defense which the facts alleged will justify. It is the facts alleged which constitute the defense, and whether or not it is called by the right name is immaterial. *Springer v. Dwyer*, 50 N. Y. (5 Sick.) 19.

§ 8. **Judgment on.** A plea of recoupment cannot authorize a judgment for damages in the defendant's favor. *Fowler v. Payne*, 52 Miss. 210. Whatever may be the amount of the defendant's damages, he can only set them up by way of abatement, either in whole or in part, of the plaintiff's demand. He cannot, as in the case of set-off, go beyond that, and have a balance certified in his favor. *Batterman v. Pierce*, 3 Hill, 171. See, also, *Stow v. Farwood*, 14 Ill. 424; *Britton v. Turner*, 6 N. H. 481. And in the case last cited it was said that if the defendant elects to have the damages considered in the action against him, he must be understood as conceding that they are not to be extended beyond the amount of what he has recovered, and he cannot afterward sustain an action for further damages. And see *Fabbricotti v. Lavnitz*, 3 Sandf. (N. Y.) 743. But see *Ward v. Fellers*, 3 Mich. 281; *Mon-del v. Steel*, 8 Mees. & W. 858.

In an Illinois case it was held that if the damages sustained by the defendant by reason of a non-compliance with the contract on the part of the plaintiff exceed the amount which the plaintiff would otherwise be entitled to recover, the defendant may recover such excess in the same action. *Springdale Cemetery Association v. Smith*, 32 Ill. 252.

And under a statute in Tennessee, in a suit upon a contract, if the defendant has sustained damages by reason of the plaintiff's non-

performance of his part of the agreement sued on, such defendant has the right to abate the plaintiff's recovery by the amount of such damages, and have damages over against him for any amount or balance for which he may be found liable. *Overton v. Phelan*, 2 Head (Tenn.), 445.

It was held in Alabama, that a defendant, by electing to recoup the damages, when sued for a breach of contract, thereby precludes himself from afterward suing for damages, for the same injury, but may still maintain an action for a trespass, which could not have been recouped in the former action. *McLane v. Miller*, 12 Ala. 643.

CHAPTER LXI.

STAMPS.

ARTICLE I.

GENERAL RULES.

Section 1. In general. The questions to be considered in this chapter are of but little practical importance at the present time, as no stamp is necessary to the validity of any written instrument, unless it is made so by some express statute, and nearly all of the statutory provisions on that subject existing in this country since 1862 have recently been repealed. Those questions may, however, be yet raised by way of defense to an action on some instrument executed, but not stamped, while they were in force, or by way of objection to the admission of such an instrument in evidence. A brief discussion of them will not, therefore, be out of place in a work of this kind.

§ 2. **When required.** The internal revenue law, enacted by congress in 1862, and taking effect October 1 of that year, required a large proportion of the written instruments, commonly used in the transaction of business, to have affixed to them proper revenue stamps of certain specified values; and to compel compliance with its provisions, not only made the parties neglecting to affix such stamps liable to heavy penalties, but declared that the omission should render the instruments themselves utterly void.

Among the instruments required to be so stamped were simple contracts of all kinds, bills of exchange, checks, promissory notes, bonds, deeds, leases and mortgages.

In respect to bills, drafts, orders for money or promissory notes, a specific penalty was prescribed, not for simply omitting to affix the proper stamp, but for any such omission with intent to evade the provisions of that act. An amendment of the same year declared all such instruments inadmissible in evidence in any court, unless duly stamped.

The act of 1865 combines these two provisions in one section, though in separate clauses, the qualification as to intent being still connected with the first.

The law now existing requires every bank check, draft or order for the payment of money, drawn upon any bank, banker or trust com-

pany, at sight or on demand, to be stamped with a two cent stamp, and declares them to be inadmissible in evidence until stamped. It also makes it unlawful to record any unstamped instrument, which at the time of issue was required by law to be stamped, and makes the record of any such instrument utterly void and inadmissible in evidence.

These are all the provisions of that law which need to be noticed in this connection. The instruments specified therein are too familiar to need defining here.

It has been held that the act does not apply to a mere written acknowledgment of a debt, not amounting to a promise or agreement to pay it. *Alter v. McDougal*, 26 La. Ann. 245. And in determining whether an instrument comes within the provisions of the act, it is held that regard is to be had to its form and face, and not to its operation; and that, though it may be a device to avoid the stamp duty, and may operate as a fraud upon the revenue, yet if carried out by legal forms, a stamp is unnecessary to its validity. *United States v. Isham*, 17 Wall. 496.

§ 3. **Effect of omission.** By a literal interpretation of the statutes of 1862, the effect of the omission of a stamp from an instrument on which one was required would be to render it utterly void and useless in any court for any purpose. The Territorial courts enforce this provision with greater strictness than those of the several States. *Patterson v. Gile*, 1 Col. T. 200. The latter courts were some of them at first disposed to accept and enforce the provisions of the law to the full extent of their terms; but a more deliberate and careful consideration of the subject soon led many of them to limit the application of the prohibitory clauses to instruments offered in evidence in the Federal courts and to proceedings had and acts done in public offices and courts established under the constitution and laws of the United States. *Carpenter v. Snelling*, 97 Mass. 452. The power of congress to legislate concerning rules of evidence to be administered by the State courts, or to affix conditions or limitations upon which they are to be applied and enforced, has been strenuously denied. *Duffy v. Hobson*, 40 Cal. 240; 6 Am. Rep. 617; *Sporrer v. Eifler*, 1 Heisk. (Tenn.) 633. It may, indeed, require instruments to be stamped, and punish violations or evasions of that requirement by fine or penalty, but the States alone can say what shall be evidence in their own courts. *Craig v. Dimock*, 47 Ill. 308; *Boston v. Nichols*, id. 353; *Hanford v. Obrecht*, 49 id. 146; *Clemens v. Conrad*, 19 Mich. 170.

The State courts have also denied the power of congress to prescribe rules for the States relative to the transfer of property; and conveyances of real estate have been held valid, though unstamped. *Moore v.*

Moore, 47 N. Y. (2 Sick.) 467; *Bumpass v. Taggart*, 26 Ark. 398; 7 Am. Rep. 623; *Wallace v. Cravens*, 34 Ind. 534; *Davis v. Richardson*, 45 Miss. 499; 7 Am. Rep. 732; *Dailey v. Coker*, 33 Tex. 815; 7 Am. Rep. 279.

But without absolutely denying the power assumed by that body, the State courts have questioned whether an unstamped instrument should be excluded from evidence, without proof that the stamp was omitted with intent to evade the statute; and the current of decisions is now very uniform and uninterrupted to the effect that the mere omission of a stamp by accident or mistake does not affect the validity of a note or other instrument upon which one should have been affixed. But, in order to invalidate it there must have been a fraudulent intent, and that intent must be affirmatively proved by the party contesting or objecting to the instrument. *Hitchcock v. Sawyer*, 39 Vt. 412; *Govern v. Littlefield*, 13 Allen (Mass.), 127; *Green v. Holway*, 101 Mass. 243; 3 Am. Rep. 339; *Emery v. Hobson*, 63 Me. 33; *Brown v. Thompson*, 59 id. 372; *Janvrin v. Fogg*, 49 N. H. 340; *Whigham v. Pickett*, 43 Ala. 140; *Perryman v. City of Greenville*, 51 id. 507; *Oxford Iron Co. v. Spradley*, id. 171; *Corry Nat. Bank v. Rouse*, 3 Pittsb. (Penn.) 18; *Baker v. Baker*, 6 Lans. (N. Y.) 509; *Frink v. Thompson*, 4 id. 489; *Timp v. Dockham*, 29 Wis. 440; *State v. Hill*, 30 id. 416; *Grant v. Conn. Mut. L. Ins. Co.*, 29 id. 125; *Rheinstrom v. Cone*, 26 id. 163; 7 Am. Rep. 48; *Ricord v. Jones*, 33 Iowa, 26; *Morris v. McMorris*, 44 Miss. 441; 7 Am. Rep. 695. The qualification of the first clause of the prohibitory section, as enacted in 1865, is thus construed to apply equally to the second clause.

The provision we have been considering is highly penal and must, therefore, be strictly construed. It cannot reach beyond the instrument by which a contract is evidenced so as to affect the contract itself, but if that contract is capable of proof by other evidence consistently with the rules of law, it is still valid and may be enforced. If, therefore, a promissory note be held void under the law for want of a stamp, the holder may still sue and recover upon the original consideration on which it was founded, relying upon other evidence to sustain his action. *Wilson v. Kennedy*, 1 Esp. 245; *Manley v. Peel*, 5 id. 121; *Tyte v. Jones*, 1 East, 59 n.; 3 Pars. on Cont. 313, 314.

§ 4. **Subsequent stamping.** The original law above referred to contained a provision for the subsequent stamping of instruments from which the requisite stamp had been omitted under certain restrictions, and upon payment of a certain penalty. By an amendatory act, instruments made prior to June 1, 1863, were allowed to be subsequently stamped without payment of any penalty. The law, as now existing,

permits the collector of revenue of the proper district to affix the proper stamp to an instrument from which it has been omitted, or a copy thereof, on request of any party having an interest therein, upon payment of the price of such stamp, and of a penalty of at least double the amount of tax unpaid (but in no case less than five dollars), and of interest at six per cent on such tax from the day when the stamp ought to have been affixed, in case it exceeds fifty dollars, the collector being required to make a note of the facts on the margin. U. S. R. S., 1874, § 3422. Such stamping renders the instrument valid and entitles it to be recorded, and to be used in evidence the same as if originally stamped. "But no right acquired in good faith before the stamping of such instrument or copy thereof, and the recording thereof ——— shall in any manner be affected by such stamping." Only a few decisions are to be found in the reports touching the effect of these provisions of the statute. It has been held that the "copy" authorized to be stamped is a substantial copy, such as will identify the subject of the tax, and that the heir of a grantor by an unstamped deed is not within the provision saving rights acquired in good faith, etc. *Miller v. Wentworth*, 82 Penn. St. 280.

Upon objection made to the admission in evidence of unstamped notes, the courts have, in several instances, permitted them to be stamped in their presence when offered at the trial, and then admitted them. *Foster v. Holley*, 49 Ala. 593; *Morris v. McMorris*, 44 Miss. 441; 7 Am. Rep. 695; *Waterbury v. McMillan*, 46 id. 635. It has also been held that, if a note appears to be properly stamped when offered in evidence, the maker cannot question it on the ground that it was not stamped when executed. *Myers v. McGraw*, 5 W. Va. 30.

§ 5. **Who may set up defense.** A party may estop himself from objecting to the absence or sufficiency of a stamp, in various ways, as by pleading the general issue to an action by an administrator, whose letters were not duly stamped, by paying money into court, generally, or by paying money on account of two bills, one of which is not stamped, leaving the holder at liberty to appropriate it if he pleases to that one. 3 Pars. on Cont. 340.

It is at least questionable whether a party to an instrument, who was bound to affix a stamp to it before executing it, can object to the omission as rendering it invalid, if it has a stamp on it when produced in evidence. *Chaffe v. Ludeling*, 27 La. Ann. 607; *Myers v. McGraw*, 5 W. Va. 30.

This estoppel should doubtless be applied where an action on such an instrument is brought by an innocent holder, who received it with a proper stamp affixed to it.

But where a bill or note was never stamped as required by law, either the maker, indorser or any other party who has made himself liable thereon, can avail himself of the want of a stamp. An acceptor of an unstamped bill is not prevented from objecting to the want of a stamp when sued on it, by the fact that he knew of the defect at the time he accepted it. *Steadman v. Duhamel*, 1 C. B. 888; *Bennison v. Jewison*, 12 Jur. 485.

A party to an executory written contract, who would be liable thereon if it was properly stamped, may defend against it on the ground of its invalidity for want of a stamp, though, as we have seen, that defense is not available in an action on the original consideration. A mortgagor may set up that defense against an unstamped mortgage, or a lessee against an unstamped lease.

Whether the false making of an instrument which is void on its face for want of a stamp would constitute the crime of forgery, has been questioned by the courts. The English decisions hold that the revenue law does not purport to alter the crime of forgery, and that the affixing of a stamp to the false instrument is not necessary to the offense. *Rex v. Hawkeswood*, 1 Leach (C. C.), 257; 2 East, 955; *Rex v. Reculist*, 2 Leach (C. C.), 703; 2 East, 956. But the supreme court of Wisconsin has held that an indictment for the forgery of an indorsement on a draft set out in full therein which did not allege or show that the draft was stamped, was bad and would not sustain a conviction. *John v. State*, 23 Wis. 504. Though this was modified by a subsequent decision, the position seems still to be maintained that the want of a stamp to the instrument charged to be forged, if one was necessary, would be a defense to the indictment.

§ 6. **How set up.** The defense that the instrument sued on is void for want of a stamp may be set up by a special plea, even by the party whose duty it was to affix the stamp. *Maynard v. Johnson*, 2 Nev. 16. And the defense that it was not stamped when executed must be set up by a special plea of denial of the execution of the instrument, otherwise evidence of that fact will not be admissible. *Glidden v. Higbee*, 31 Iowa, 379. The fraudulent omission to stamp a note should, *it seems*, be set up by plea, since it cannot be taken advantage of by demurrer. *Campbell v. Wilcox*, 10 Wall. 421. But the want of a stamp need not be specially pleaded to a bill, as it may be shown under a plea of non-acceptance. *Dawson v. Macdonald*, 2 M. & W. 26; *Field v. Woods*, 8 C. & P. 52; 7 A. & E. 114.

The usual practice seems to be to object to the admission of the unstamped instrument in evidence. This objection is available only when the instrument, if stamped, would be evidence to establish some point

litigated between the parties. If the purpose for which it is offered is merely collateral, and does not assume that the instrument is valid or operative in favor of the party producing it, the want of a stamp is not sufficient to exclude it. 3 Starkie on Ev. 1058; 3 Pars. on Cont. 344.

This rule prevails as well in criminal as in civil cases, and if the validity of the instrument is of the essence of the offense for which an indictment is found, it is held that the want of a stamp will prevent its use as evidence; but if it be not so essential, it will be admissible.

The objection, it is held, must be taken at the earliest practicable moment. It must ordinarily be taken before the instrument is read at the trial, but if the objection does not appear upon its face, and can only be shown by extrinsic evidence, it may be read, subject to the objection, and the proof of its objectionable character produced afterward.

In case the question of the validity of such an instrument is raised by objection to its admission in evidence, the presumption of innocence, or compliance with law, will be invoked in its favor, until the contrary affirmatively appears, and the burden of proof will be upon the party objecting. *Owsley v. Greenwood*, 18 Minn. 429; *Prather v. Zulauf*, 38 Ind. 155; *Cabbott v. Radford*, 17 Minn. 320; *Grand v. Cox*, 24 La. Ann. 462; *Rheinstrom v. Cone*, 26 Wis. 163; 7 Am. Rep. 48; 2 Parsons' Notes, etc., 279, 280.

The burden of proof that the instrument produced in evidence is liable to a stamp is also upon the party objecting, unless it is *prima facie* liable, in which case it is on the other party. *Waddington v. Francis*, 5 Esp. 182; *Dudley v. Robins*, 3 C. & P. 26; *Chanter v. Dickinson*, 5 M. & G. 253. But the objection to the validity of the stamp by reason of alterations made in the instrument after it was affixed, throws the burden of proof on the party relying upon it to account for such alterations. *Knight v. Clements*, 8 A. & E. 215; *Bartlett v. Smith*, 11 M. & W. 483.

Where a suit is brought by an administrator, the objection that his letters are void for want of a stamp must be raised by plea. *Thynne v. Protheroe*, 2 M. & S. 553.

CHAPTER LXII.

STATUTE AUTHORITY.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition and nature. It is within the scope of legislative power to authorize and legalize many acts by individuals or by corporate bodies, which, without such authority, would be infringements upon the rights of others, and furnish grounds of action; and the subject of this chapter is the authority so conferred, and its availability as a defense or justification of acts done by virtue of it. The majority, if not all of the cases, in which such authority has usually been granted, have been noted in the preceding chapters of this work; and it will be necessary here only to state and illustrate the general principles which govern them all. This power of the legislature may be exercised by the enactment of either general or special laws. Among the former may be named those laws which authorize the taking of private property for highways, railroads, mill ponds, streets, parks and other public uses, the distraining of goods for rent, the impounding of cattle found doing damage, the arrest and imprisonment of fraudulent and absconding debtors, criminals and tort-feasors, and the levying upon and selling property for debts or taxes. Among the latter may be mentioned special charters of municipal and private corporations, and special acts granting franchises, such as those for the erection or maintenance of toll bridges, ferries and the like.

Such laws are sustained upon the general principle that the rights of individuals must give way to the necessities of the public welfare; and to all of them is applied the rule that, in order to justify the exercise of the powers conferred, the conditions and limitations prescribed by the laws themselves must be strictly met and observed.

§ 2. **When a defense.** The general rule is that no action will lie for an act done by virtue of a statute authority, provided the statute is strictly pursued, and no negligence or want of due care and skill on the part of the claimant of such authority is shown. *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679; *Chapman v. Atlantic & St. L. R. R.*

Co., 37 Me. 92; *Burroughs v. Housatonic R. R. Co.*, 15 Conn. 131; *Herring v. Wilmington & Raleigh R. R.*, 10 Ired. 402; *Sunbury & Erie R. R. Co. v. Hummell*, 27 Penn. St. 99; *Morris, etc., R. R. Co. v. Newark*, 10 N. J. Eq. 352. A work which is authorized by the legislature cannot be adjudged a nuisance, if executed in the manner and at the place authorized; provided its injurious effects arise as the necessary or probable result of the act done in pursuance of the statute, and the party doing it was guilty of no negligence. *Stoughton v. State*, 5 Wis. 291; *Harris v. Thompson*, 9 Barb. 350; *Easton v. N. Y., etc., R. R. Co.*, 24 N. J. Eq. 49; *Stoudinger v. Newark*, 28 id. 187, 446; *People v. N. Y. Gas-light Co.*, 6 Lans. (N. Y.) 467; *Richardson v. Vt. C. R. R. Co.*, 25 Vt. 465. See Vol. 4, p. 784; Vol. 6, pp. 49, 58; Vol. 1, p. 145.

But these positions are true only when the statute conferring the authority is constitutional and valid, and clearly and unmistakably confers the authority claimed; and even then, a strict compliance with all the conditions precedent to its exercise, and all the provisions for the benefit or protection of persons to be affected thereby, must be shown. In the absence of legislation by congress bearing on the case, a statute of a State which authorizes the erection of a dam across a navigable river which is wholly within her limits is not unconstitutional. *Pound v. Turk*, 95 U. S. (5 Otto) 459.

A landlord is exercising authority conferred by law in distraining goods for rent; and if his rent was due, and the goods taken were subject to that right, and if his proceedings be in strict conformity to the statute under which he acts, he will be protected by it. On this point it is sufficient to refer to Vol. 4 of this work, pp. 267 to 269.

The right of impounding animals doing damage upon lands, though derived from the common law, is generally provided for and regulated by statutes in this country. If the animals are taken under the circumstances specified in the statute, and the land-owner proceeds in strict accordance with its provisions, it will justify his acts. *Storey v. Robinson*, 6 Term R. 138; *Lindon v. Hooper*, 1 Cowp. 414; *Field v. Adams*, 12 Ad. & E. 649; *Cowles v. Balzer*, 47 Barb. 562; *Leavitt v. Thompson*, 52 N. Y. (7 Sick.) 62; *Heath v. Ricker*, 2 Greenl. 408; *Ladue v. Branch*, 42 Vt. 574; *Mills v. Stark*, 4 N. H. 512; *Hamlin v. Mack*, 33 Mich. 103; *Warring v. Cripps*, 23 Wis. 460.

It is the authority of law which justifies and protects a ministerial officer in arresting and imprisoning a debtor, tort-feasor or criminal, though this effect is too often loosely and inaccurately attributed to his process. The law prescribes the conditions on which process may issue, and its mode of execution, and gives efficacy to its commands. So,

also, in respect to the levy upon or seizure of property under an attachment, execution or other writ. If the process is apparently good, and the officer, acting in good faith, keeps strictly within the line of his legal duty, and does nothing which is not authorized by law to be done under such process, he is protected. *Underwood v. Robinson*, 106 Mass. 296.

In the seizure of property, he must, of course, confine himself to that which belongs to the defendant in his writ, and is not by law exempt from seizure, and act in strict conformity to law in taking and caring for it. *Laver v. McGlachlin*, 28 Wis. 364; *Battis v. Hamlin*, 22 id. 669; *Young v. Wise*, 7 id. 128; *Bogert v. Phelps*, 14 id. 88; *Savacool v. Boughton*, 5 Wend. 170; *Sheldon v. Van Buskirk*, 2 N. Y. (2 Comst.) 473.

Laws for the collection of taxes confer upon the collector authority to use certain forcible measures to that end. His warrant expresses that authority, and if that is valid on its face, he is protected in using those measures. *McLean v. Cook*, 23 Wis. 364.

The right, inherent in every sovereignty, to appropriate the private property of its citizens or subjects to public use, only awaits the action of the proper legislative power to declare, or provide for a determination of the necessity of the taking, and to direct the occasions, modes, conditions and agencies for its exercise. Cooley on Const. Lim. 528. The legislature sometimes exercises this power directly, but more frequently it is delegated to, and exercised by municipal or private corporations, or even individuals. This is the power of eminent domain, under which private lands are taken for streets, parks, highways and railroads, and streams are obstructed by dams for the benefit of mills or water-works. Compensation to the owner of the land taken or injured is a primary requisite to the valid exercise of this power. *Shepardson v. Mil. & Bel. R. R. Co.*, 6 Wis. 605; *Walther v. Warner*, 25 Mo. 277; *Gilmer v. Lime Point*, 18 Cal. 229; *Curran v. Shattuck*, 24 id. 427; *Memphis & C. R. R. Co. v. Payne*, 37 Miss. 700; *Henry v. Dubuque & Paci. R. R. Co.*, 10 Iowa, 540; *Ash v. Cummings*, 50 N. H. 591; *Carr v. Georgia R. R. Co.*, 1 Kelly, 532; *S. W. Railroad Co. v. Telegraph Co.*, 46 Ga. 43; 12 Am. Rep. 585.

All the provisions of such acts for the benefit of the person whose property is taken, such as those for notice of the proceedings, for the proper determination of the necessity of taking it, for the effort to agree as to compensation, and upon failure of such attempt, for the selection of a proper jury or board of commissioners to determine such compensation, and the like, are conditions precedent to the exercise of the right; and the party claiming the authority is bound to show a strict compliance therewith. If he does so the law affords him a defense to

all actions for injuries caused by the exercise thereof. *Gillinwater v. Miss., etc., R. R. Co.*, 13 Ill. 1; *Stanford v. Worn*, 27 Cal. 171; *Nichols v. Bridgeport*, 23 Conn. 189; *People v. Brighton*, 20 Mich. 57; *Shaffner v. St. Louis*, 31 Mo. 264.

Unless the statute contains special provisions to that effect a municipal corporation is not liable for consequential damages to private property or persons, caused by grading, leveling and repairing of streets, and the like, where the act complained of was done by it or its officers under and pursuant to authority conferred by a valid act of the legislature, and there has been no want of reasonable care or reasonable skill. *Radcliff v. Mayor, etc., of Brooklyn*, 4 N. Y. (4 Comst.) 195; *Rounds v. Mumford*, 2 R. I. 154; *Sprague v. Worcester*, 13 Gray, 193; *Bennett v. New Orleans*, 14 La Ann. 120; *Snyder v. Rockport*, 6 Ind. 237; *Alexander v. Milwaukee*, 16 Wis. 247; *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 779; Dill. on Mun. Corp., § 781, etc. This rule of non-liability should be limited to acts done for the public benefit. *Tinsman v. Belvidere R. R. Co.*, 2 Dutch. (N. J.) 148; *Quinn v. City of Paterson*, 3 id. 35.

§ 3. **When not a defense.** A statute which is in violation of the State or Federal Constitution, being void, can neither confer authority to act, nor afford protection to one who has acted under it. *Strong v. Daniel*, 5 Ind. 348; *Sumner v. Beeler*, 50 id. 341; 19 Am. Rep. 718. *Astrom v. Hammond*, 3 McLean, 107; *Barling v. West*, 29 Wis. 307; 9 Am. Rep. 576. And see *Railroad Co. v. Husen*, 95 U. S. (5 Otto) 465.

The power of eminent domain extends only to the appropriation of property for what can be deemed a public use; and a law which attempts to authorize a taking of property for a private use can afford no defense for acts done in carrying out its provisions. Cooley's Const. Lim. 529, etc.; *Beekman v. Saratoga, etc., R. R. Co.*, 3 Paige, 73; *Sadler v. Langham*, 34 Ala. 311; *Pratt v. Brown*, 3 Wis. 603; *Osborn v. Hart*, 24 id. 89; 1 Am. Rep. 161; *N. Y. & Harlem R. R. Co. v. Kip*, 46 N. Y. 546; 7 Am. Rep. 385; *Tyler v. Beacher*, 44 Vt. 648; 8 Am. Rep. 398; *Bankhead v. Brown*, 25 Iowa, 540; *Dickey v. Tennison*, 27 Mo. 373; *Wild v. Deig*, 43 Ind. 455; 13 Am. Rep. 399. Even under a valid law the party whose property is appropriated is entitled to demand a strict compliance with all its provisions for his benefit.

And, substantially, the same rule prevails in respect to all statutory powers. If they are exceeded, or not strictly pursued, or the acting party is guilty of negligence in the exercise thereof, the statute will furnish no defense. *Brownlow v. Metropolitan Board of Works*,

13 C. B. (N. S.) 768; 16 id. 546; *Fero v. Buffalo & State Line R. R. Co.*, 22 N. Y. (8 Smith) 209; *Huyett v. Philadelphia & Reading R. Co.*, 23 Penn. St. 373. Upon the ground of negligence in its performance, even an authorized act may be adjudged a nuisance. *Commonwealth v. Clarke*, 1 A. K. Marsh. 323; *Louisville v. Rolling Mill Co.*, 3 Bush (Ky.), 416; *Wilson v. City of New Bedford*, 108 Mass. 261; 11 Am. Rep. 352; *Cincinnati v. Penny*, 21 Ohio St. 499; 8 Am. Rep. 73.

A ministerial officer cannot justify an arrest, under a law authorizing it, if his process is void for non-compliance therewith. *Vinton v. Weaver*, 41 Me. 430. Nor, under a valid process, authorizing the seizure of property, can he justify the taking of that which the law says shall be exempt (*Foss v. Stewart*, 14 Me. 312; *Kiff v. Old Colony, etc., R. Co.*, 117 Mass. 591; 19 Am. Rep. 429); or the property of a stranger to his writ. *Woodbury v. Long*, 8 Pick. 543; *Owings v. Frier*, 2 A. K. Marsh. 268; *Jamison v. Hendricks*, 2 Blackf. 94; *Lyon v. Goree*, 15 Ala. 360; *Smyth v. Tankersley*, 20 id. 212; *Yates v. Wormell*, 60 Me. 495.

In these and all like cases, the protection of the statute fails, if the defendant has not become possessed of its authority by compliance with the conditions precedent, or has gone beyond or outside of that authority in the acts complained of.

§ 4. **How construed.** It is a general rule, that all statutes which are in derogation of the common-law rights of the citizen must be strictly construed, so that no one whose rights are to be affected thereby may suffer wrong. Cooley's Const. Lim. 61. A power conferred by statute can be constructively enlarged only in conformity with the principles governing the legal construction of statutes, and because a necessary, or at least a reasonable implication, requires such enlargement. The question in such a case is, whether, without the importation of some matter into it, the statute will be wholly or in part inoperative. *State v. Charleston*, 1 So. Car. 30.

Grants of corporate powers or privileges are always strictly construed, and nothing will be held to pass by implication. *Providence Bank v. Billings*, 4 Pet. 514; *Fleckner v. Bank of U. S.*, 8 Wheat. 338; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How. (U. S.) 172. No privilege is to be deemed conferred by the charter of a private corporation unless it is expressed in plain and unequivocal words. *Pennsylvania R. R. Co. v. Canal Commissioners*, 21 Penn. St. 9; *Wright v. Briggs*, 2 Hill, 77; *Mayor, etc., of Macon v. Macon & W. R. R. Co.*, 7 Ga. 221; *Richmond, etc., R. R. Co. v. Louisa. R. R. Co.*, 13 How. 71; *Bradley v.*

New York & New Haven R. R. Co., 21 Conn. 294; *Packer v. Sunbury & Erie R. R. Co.*, 19 Penn. St. 211; *Wales v. Stetson*, 2 Mass. 143; *Chenango Bridge Co. v. Binghamton Bridge Co.*, 27 N. Y. 87; *State v. Krebs*, 64 No. Car. 604.

This rule applies with equal force to powers granted to municipal corporations. *Reed v. Toledo*, 18 Ohio, 161; *Rochester v. Collins*, 12 Barb. 559; *Savannah v. Hartridge*, 8 Ga. 23.

§ 5. **Private or special statutes.** Private grants to individuals of powers or privileges designed to be exercised with special reference to their own advantage, although they may involve in their exercise some incidental benefits to the community generally, are to be expounded liberally in favor of the public, and strictly as against the grantees. *Bradley v. New York & New Haven R. R. Co.*, 21 Conn. 294; *Martin v. Waddell*, 16 Pet. 367; *Coolidge v. Williams*, 4 Mass. 140; *People v. Lambier*, 5 Denio, 9; *Griffing v. Gibb*, 1 McAll. 212. A power to be exercised by individuals will not arise by implication, but must be specially conferred by the legislature. *Markham v. Howell*, 33 Ga. 508.

A special or limited judicial power is also to be construed strictly, and persons exercising such a power must confine themselves within the prescribed limits, and will render themselves liable if they do acts beyond the scope of their authority. *Blood v. Sayre*, 17 Vt. 609. Statutory powers conferred upon a board of officers must be strictly pursued, else their decision or action is a nullity. *Green v. Beeson*, 31 Ind. 7. And the record of proceedings in execution of a special statutory power must show affirmatively every fact necessary to sustain them. *Leak v. Richmond Co.*, 64 No. Car. 132.

§ 6. **Who may set up.** Not only the person or corporation upon whom the statute confers the authority, but, except where the statute requires it to be exercised by some particular individual or officer, any person acting in aid of, or under the direction of such person or corporation, may set up the statute as a defense to an action for an injury caused by his acts done in pursuance thereof. Thus, the deputies of a sheriff, and any person whom he may have called to his aid in the execution of lawful process, may justify under the authority conferred by law upon the sheriff. *McMahan v. Green*, 34 Vt. 69; *Main v. McCarty*, 15 Ill. 441. And the officers of a municipal corporation may set up the authority of the charter in justification of acts done by them in a proper manner under its provisions. *American Print Works v. Lawrence*, 3 Zab. (N. J.) 9.

§ 7. **How set up.** A defense that the act for which the suit was brought was done under the authority conferred by some statute, is one

in justification or excuse of such act, and the general rule is, that such matter must be pleaded, and cannot be taken advantage of under a plea of the general issue, or a general denial. 1 Chitty's Pl. 159, 408; *Ely v. Ehle*, 3 N. Y. (3 Comst.) 506; *Seymour v. Billings*, 12 Wend. 285; *Levi v. Brooks*, 121 Mass. 501.

If the statute conferring the authority in itself directs in what manner a party shall be entitled to take advantage, as by pleading it in bar or otherwise, he must avail himself of it at the proper time, and in the form and manner prescribed. Potter's Dwaris, 150; *Taylor v. Blair*, 3 Term R. 452.

It is a general rule that a private statute under which a party claims any right must be pleaded, but that a public act need not be. The courts take judicial notice of public acts, and therefore it is sufficient for a defendant justifying under such an act to set up the facts which bring him within its protection. But a private act must be brought to the notice of the court by pleading it, otherwise the defense arising under it cannot be given in evidence. Potter's Dwaris, 53-55. Whether such an act must be set out in full, or in what manner it shall be referred to in the pleading, is usually regulated by some general statute.

CHAPTER LXIII.

SUSPENSION OF RIGHT OF ACTION.

ARTICLE I.

GENERAL RULES.

Section 1. Definition and nature. Ordinarily the existence of a right of action, and the power to sue thereon immediately are concurrent, but there are exceptions to this, as to all general rules. The party having such right may debar himself from the present enforcement thereof by his acts or agreements, amounting to an extension of the time of payment or of performance by the other party, or he may be restrained and prevented from suing by the operation of statutory or public law. In such cases the right itself is not taken away, but for the time being the party cannot avail himself of it. He must wait until the time for which the extension was granted has passed, or the obstacle interposed by the law is removed, and may then assert his original right of action.

§ 2. **What operates as a suspension.** An agreement between a creditor and his debtor, or between two parties to a contract, whereby such creditor agrees to extend the time for the payment of the debt, or the one party agrees to give the other time until the doing of a certain thing, the happening of a certain event, or the coming of a future day certain in which to perform his obligation, will suspend the right to sue on the original cause of action until the agreed day arrives or contingency happens, provided such agreement is founded on a good consideration, and is otherwise valid. 2 Pars. on Cont. 685; *Blunt v. Walker*, 11 Wis. 334; *Ford v. Mitchell*, 15 id. 304. Thus, an agreement by the holder of a note to extend the time of payment of the balance, in consideration of the payment of part of the amount before due, is valid and suspends the right of action on such note. *Newsam v. Finch*, 25 Barb. 175. And the mere payment of interest on a note in advance, whether at the stipulated rate or at a higher rate, raises an implied promise to extend the time of payment during the period for which interest is so paid, if it is accepted by the holder. *Jarvis v. Hyatt*, 43 Ind. 163; *Woodburn v. Carter*, 50 id. 376.

A promise to be performed at some future day, if valid, will support an agreement for forbearance until that day, and if it be further agreed that the performance of such promise shall satisfy the debt or contract, and it is performed on the agreed day, the right of action is barred, but if it be not performed, the right to sue on the original cause immediately revives, unless, by the terms or the legal effect of the agreement, the new promise was itself to be a satisfaction and extinction of the old obligation. 2 Pars. on Cont. 683, 685.

That the acceptance by the creditor of a negotiable note, whether made by the debtor or by a third person, which is payable at a future day, will, in the absence of any agreement or circumstances modifying its effect, suspend the creditor's right of action on the original debt until such note is due, has already been stated in chapter 10, Vol. 6, p. 556. This position is sustained by numerous authorities, among which are the following: *Smith v. Applegate*, 1 Daly, 91; *Place v. McIlvain*, 38 N. Y. (11 Tiff.) 96; *Central City Bank v. Dana*, 32 Barb. 296; *Dorlon v. Christie*, 39 id. 610; *Muldon v. Whitlock*, 1 Cow. 290; *Chickasaw Co. v. Pitcher*, 36 Iowa, 594; *Skip v. Huey*, 1 Atk. 91, *n.*; *Price v. Price*, 16 M. & W. 231; *Rees v. Berrington*, 2 Ves. Jr. 540. And to sustain an action on the original debt after such note has become due, the creditor must produce such note to be canceled at the trial. *Eastman v. Porter*, 14 Wis. 39; *Plant's Manuf. Co. v. Falvey*, 20 id. 200; *Moses v. Trice*, 21 Gratt. 556; 8 Am. Rep. 609; *De Yampert v. Brown*, 28 Ark. 166; *Holmes v. DeCamp*, 1 Johns. 34; *Burdick v. Green*, 15 id. 247.

The acceptance of a check or draft for a debt, if not taken absolutely as payment, operates merely to suspend temporarily the remedy upon such debt, but that is revived upon its dishonor. *Tanner v. Bank of Fox Lake*, 23 How. Pr. 399; *Genin v. Tompkins*, 12 Barb. 265; *Kermeyer v. Newby*, 14 Kans. 164; *Heartt v. Rhodes*, 66 Ill. 351; *Puckford v. Maxwell*, 6 Term R. 52; *Smith v. Miller*, 6 Abb. (N. S.) 234; *Gibson v. Toby*, 53 Barb. 191; *Burkhalter v. Second Nat. Bank*, 42 N. Y. (3 Hand) 538.

In many of the American States all actions against the personal representatives of a deceased person, upon claims against his estate are, by statute, suspended for one year or some other specified time, during which he is required to take measures for the settlement of the estate. This suspension has been held to apply to the case of an administrator *de bonis non*, as well of those whom he succeeds in the trust. *Minor v. Webb*, 1 Heisk. (Tenn.) 395.

So long as war exists between two governments of which contracting parties are respectively citizens, the right of a citizen of the one

government to sue in the courts of the other is suspended, and this rule has been held to apply equally to the late civil war in this country. *Chappelle v. Olney*, 1 Sawy. (U. S.) 401; *Brooke v. Filer*, 35 Ind. 402; *Sanderson v. Morgan*, 39 N. Y. (12 Tiff.) 231; *Knoefel v. Williams*, 30 Ind. 1. See Vol. 1, p. 215.

This suspension lasts only while the state of war exists, and at its close the right of action revives. *Louisville, etc., R. R. Co. v. Buckner*, 8 Bush (Ky.), 277; 8 Am. Rep. 462. An action may, therefore, be maintained by a citizen of Mississippi against a Connecticut insurance company more than one year after the loss, notwithstanding a provision in such policy that no suit should be brought upon it unless within that time, where the right of action was suspended by the war. *Semmes v. City, etc., Ins. Co.*, 6 Blatchf. 445.

The effect of war as a suspension of the right of action extends not merely to the remedy against the debtor personally, but it will prevent the foreclosure of a mortgage upon his real estate. *Kanawha Coal Co. v. Kanawha, etc., Coal Co.*, 7 Blatchf. 391.

§ 3. **What does not.** It is a general rule, that a written instrument cannot be modified or discharged except by something of equal dignity or validity. Thus, a contract which is in writing, and is required by law to be so, cannot be modified by a mere parol executory agreement. The right of action upon a bond or contract under seal for the payment of money cannot, therefore, be suspended by the mere taking of a bill or note from the obligor for the same money, unless such bill or note is actually paid. *Byles on Bills*, 304; *Paine v. Voorhees*, 26 Wis. 522; *Davey v. Prendergrass*, 5 B. & Al. 187.

Taking a note payable on demand, or the same time as the original obligation, shows no intention to forbear suit thereon, and does not suspend the right of action. *Fearn v. Cochrane*, 4 C. B. 274; *Kinsley v. Buchanan*, 5 Watts, 118; *Bay v. Codrington*, 5 Johns. Ch. 54; *Robinson v. Dale*, 38 Wis. 330.

Nor will the taking of a non-negotiable note have that effect, unless it is founded on some new consideration. *Geller v. Seixas*, 4 Abb. Pr. 103; *Huse v. McDaniel*, 33 Iowa, 406.

Nor will the taking of a mortgage or of other securities as collateral to the original debt suspend the right of action thereon. *U. S. v. Hodge*, 6 How. (U. S.) 279; *Taggard v. Curtenius*, 15 Wend. 155; *Palmer v. Gurnsey*, 7 Wend. 248; *Molson's Bank v. McDonald*, 40 U. C. Q. B. 529; *Hayes v. Wells*, 34 Md. 512; *Van Etten v. Trouden*, 1 Hun, 432; *Wyke v. Rogers*, 1 D. G. M. & G. 408; *Taylor v. Allen*, 36 Barb. 294; *Fox v. Parker*, 44 id. 541.

If a creditor is induced to accept a note or other security, by fraud, or

to take one which is worthless or void for forgery or usury, he need not wait, but can sue immediately and recover on the original demand. *Miller v. Woods*, 21 Ohio St. 485; 8 Am. Rep. 71; *Roberts v. Fisher*, 43 N. Y. (4 Hand) 159; *Goodrich v. Tracy*, 43 Vt. 314; 5 Am. Rep. 281; *Ramsdell v. Soule*, 12 Pick. 126; *Johnson v. Johnson*, 11 Mass. 359.

Whether war shall suspend the right of an alien enemy to sue in our courts depends not so much upon whether he had a legal citizenship in the enemy's country at the commencement of the war, which he may resume afterward, as upon where his actual residence is during the war, and whether if allowed to recover his dues the probable effect will be to place the amount within reach of the enemy. For this reason it is held that the civil war did not suspend the right of action of a person having a residence within the Confederate States, but who lived in the loyal or neutral States and maintained his allegiance to the U. S. government during the war. *Zacharie v. Godfrey*, 50 Ill. 186. Nor does war have any effect to suspend proceedings against an alien enemy. *Dorsey v. Kyle*, 30 Md. 512; *Dorsey v. Dorsey*, id. 522; *Mixer v. Sibley*, 53 Ill. 61.

§ 4. **Who may interpose defense.** Either the principal contractor or debtor, or his surety or indorser, may avail himself of this defense. The right of the principal contractor or debtor to set up a valid contract for forbearance, as a defense to an action commenced before the agreed time has expired, is self-evident. And his right to claim exemption from suit as an executor or administrator, or to object to the disability of an alien enemy to sue him, is no less evident. But the right of an indorser or surety to set up the defense stands upon different ground. That ground is, that the creditor, by consenting to extend the time of payment, has attempted to make a new contract for him without his consent, and has embarrassed his remedy against other parties to the contract.

A valid agreement by the holder of a note to suspend his right of action against the maker discharges the indorser; and it makes no difference whether such agreement was made before or after the maturity of the note. *Bradford v. Hubbard*, 8 Pick. 155; *Lobdell v. Niphler*, 4 La. 294; *Sargent v. Appleton*, 6 Mass. 85; *Okie v. Spencer*, 2 Whart. 255. So, also, an agreement to suspend or delay the remedy on a bill of exchange as against the drawer or acceptor discharges the other parties. *McLemore v. Powell*, 12 Wheat. 554; *King v. Baldwin*, 2 Johns. Ch. 554; *Laxton v. Peat*, 2 Camp. 185. And if the holder of an obligation to which a third person has become a party as guarantor or surety, without the consent of the latter, enters into a

valid contract for delay in the collection or enforcement of the liability of the principal debtor or contractor, or adopts any other course which operates as a suspension of the right to enforce it, he thereby discharges the surety, and the latter may set up that defense. *Wilson v. Lloyd*, L. R., 16 Eq. 60; 6 Eng. R. 642; *Overend G. & Co. v. Oriental F. Co.*, L. R., 7 H. of L. 348; 11 Eng. R. 27; *Bailey v. Griffith*, 40 U. C. Q. B. 418; *White v. Summers*, 57 Tenn. 154; *Billington v. Wagener*, 33 N. Y. (6 Tiff.) 32; *Ducker v. Rapp*, 67 N. Y. (22 Sick.) 464; *Holland v. Johnson*, 51 Ind. 346; *Yeary v. Smith*, 45 Tex. 56; *Andrews v. Marrett*, 58 Me. 539; *Weed S. M. Co. v. Oberreich*, 38 Wis. 325; *Robinson v. Dale*, id. 330.

§ 5. **How interposed.** As against a creditor who has extended the time of payment, the defense of the principal contractor or debtor is substantially that the action is prematurely brought, and the proper mode of taking advantage of it is by plea in abatement. 1 Chit. Pl. 453; *Millett v. Hayford*, 1 Wis. 401.

As against an alien enemy, his defense is the disability of the plaintiff, and that only affects his present right of action, and should also be pleaded in abatement. But the defense of an indorser or surety is, that he is absolutely discharged from liability, and the facts upon which he claims such discharge should be pleaded in bar.

CHAPTER LXIV.

TENDER.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition and nature. Tender is defined to be “an offer to deliver something, made in pursuance of some contract or obligation, under such circumstances as to require no further act from the party making it to complete the transfer.” 2 Bouv. Dict. 581. In relation to money debts, tender is an offer of a sum of money in satisfaction of the debt or claim, by producing and showing the amount to the creditor or party claiming, and expressing verbally a willingness to pay it. 1 Wait’s L. & Pr. 1043. The general rule is, that to constitute a valid, legal tender, there must be an actual offer of the sum due, unless the actual production of the money be dispensed with by a refusal to accept, or something equivalent thereto, and this offer must be an absolute one, not coupled with any condition. *Bakeman v. Pooler*, 15 Wend. 637; *Hunter v. Warner*, 1 Wis. 141.

The principle of a *plea* of tender is this, that the defendant has always been ready at all times to pay upon request, and on a particular occasion offered the money. *Hesketh v. Fawcett*, 11 Mees. & W. 356; S. C., 2 Dowl. (N. S.) 829. Accordingly, where a tender has been actually made, the effect of it may be defeated, by showing a prior or subsequent demand and refusal of the identical sum tendered; because thereby the plaintiff negatives that the defendant was always ready to pay. 2 Chit. Plead. (16th Am. ed.) 469, 470. And see *Lanier v. Trigg*, 6 Sm. & M. (Miss.) 641; *Besancon v. Shirley*, 9 id. 457; *Fuller v. Pelton*, 16 Ohio, 457; *Raymond v. Bearnard*, 12 Johns. 274.

§ 2. **In actions upon contracts.** There is said to be no doubt in regard to the principle, upon which a tender is allowable at common law. In every contract by which a party binds himself to deliver goods, or pay money to another, he in fact engages to do an act which he cannot completely perform without the concurrence of the party to whom the delivery or payment is to be made. Without acceptance on the part of him who is to receive, the act of him who is to deliver or pay can amount

only to a tender. But the law considers a party who has entered into a contract to deliver goods or pay money to another as having substantially performed it, if he has tendered the goods or money to the party to whom the delivery or payment was to be made. *Startup v. MacDonald*, 6 Man. & Gr. 593, 610. And it is the general rule, that a tender may be made in all cases, where the demand is in the nature of a debt, where the sum due is either certain, or is capable of being made certain by mere computation. *Green v. Shurtliff*, 19 Vt. 592. A valid tender may be made even where the claim is upon a *quantum meruit*. *Cox v. Brain*, 3 Taunt. 95; *Searle v. Barrett*, 2 Ad. & El. 82; S. C., 4 Nev. & M. 200; 3 Dowl. P. C. 13. And so, on a bare covenant for the payment of money, the defendant may plead a tender. *Johnston v. Clay*, 7 Taunt. 486; S. C., 1 Moore, 200.

§ 3. **In actions for a tort.** But it is well settled that, at common law, a tender cannot be pleaded in an action on the case, nor in any action, whether upon a contract or for a tort, where the action is brought strictly for the recovery of *unliquidated* damages. *Searle v. Barrett*, 2 Ad. & El. 82; S. C., 4 Nev. & M. 200; 3 Dowl. P. C. 13; *Green v. Shurtliff*, 19 Vt. 592; 1 Wait's L. & Pr. 1057. This rule is, however, abrogated by statute in Massachusetts and New York, and tender is allowed in cases of involuntary trespass. See *Warren v. Nichols*, 6 Metc. 261; *Lawrence v. Gifford*, 17 Pick. 366. In New York, in an action for an injury done by one vessel to another, the defendant was allowed to tender amends on the ground that the injury was casual and involuntary. *Slack v. Brown*, 13 Wend. 390. See *Williams v. Price*, 3 Barn. & Ad. 695.

§ 4. **When necessary.** When a debt is due on a contract executed, and the party to whom it is payable is entitled to it, without the performance of any thing on his part, and the object of the debtor is to discharge himself from an action for it, an actual tender is necessary unless dispensed with. *Wagenblast v. McKean*, 2 Grant's (Penn.) Cas. 393.

In an early case in South Carolina, it was held that an action for money had and received cannot be maintained without a tender or return of the property; but that an action for the breach of a warranty, express or implied, can be maintained without such tender or return. *Ashley v. Reeves*, 2 McCord (So. Car.), 432.

If money paid in advance is to be forfeited, in case the residue be not paid by a certain day, the party who is to pay must tender or use his best endeavor to tender the balance due on or before the day limited. *Bayley v. Duvall*, 1 Cranch's C. C. 283.

So, where an execution has been levied on goods and chattels which

have been sold, and the proceeds paid over to the creditor, he cannot maintain an action to obtain a new execution, upon the ground that the goods were not the property of the debtor, until he has refunded the money thus received, or tendered it back. *Batchelder v. Wason*, 8 N. H. 121.

To restore property illegally seized, the defendant must pay the costs accrued and tender the thing at the place of seizure. *Powers v. Florence*, 7 La. Ann. 524.

As to what acts will or will not excuse a party from making a tender, see *post*, p. 593, Art. 2, § 14.

§ 5. **By whom made.** If there is but one debtor, and he makes a proper tender of the amount, no question can arise as to whether the tender was made by the right person. So, if there are several debtors, a tender by all or any one of them is sufficient; and the rule is the same whether the debtors are jointly, or jointly and severally liable. Nor need a tender be made by the debtor in proper person, for he may employ an agent for that purpose, and a proper tender by an agent duly authorized will be equally valid. And if an agent is furnished with a specific sum of money for the purpose of making a tender, and he, at his own risk, tenders a greater sum, such tender will be valid. *Read v. Goldring*, 2 Maul. & Selw. 86. And it is held that want of authority in an agent, to make a tender, cannot be alleged in the answer, unless objected to when the tender was made. *Lampley v. Weed*, 27 Ala. 621. Where a corporation appointed three agents to tender a certain sum to B. and obtain from him a reconveyance of certain real estate conveyed to him by the corporation as security for the repayment of the money, it was held that either one of the three was authorized to make the tender. *St. Paul Division v. Brown*, 11 Minn. 356.

A tender, in order to be a bar, must, however, be in general made by the debtor or his legal representative, and not by a stranger. *McDougald v. Dougherty*, 11 Ga. 570. See *Cropp v. Hambleton*, Cro. Eliz. 48; *Watkins v. Ashwicke*, id. 132; *Harris v. Jex*, 66 Barb. 232; S. C., 55 N. Y. (10 Sick.) 421. Though it seems that a tender may be valid in some instances, even when made by a stranger. And where there was an interview between the plaintiff and the defendant, at which the defendant was willing to pay a specified sum, which a third person present offered to go up stairs in the house where they were and get, but was prevented by the plaintiff, who said she need not trouble herself, for he could not take it, and it also appeared that she had the money there, this was held to be a sufficient tender by the defendant himself, although he did not, at the time, take notice of what was done, because

his subsequently pleading it was a sufficient ratification of the act. *Harding v. Davies*, 2 Carr. & P. 78.

Any person may make a tender on behalf of an idiot (Co. Litt. 206 b); and a tender of money for an infant, by his uncle, was held to be good, though not appointed guardian at the time of tender. *Brown v. Dysinger*, 1 Rawle (Penn.), 408. So, a tender may be made by an inhabitant of a school district, on behalf of such district, without any express authority, and, if ratified by the district, it is a good tender. *Kincaid v. School District, etc.*, 11 Me. 188.

But a party, having no interest in mortgaged premises or in a tender made, has no right to make a tender on his own behalf of the amount due on the mortgage. *Mahler v. Newbaur*, 32 Cal. 168. And a lessor may refuse a tender of the rent by one to whom the premises have been subleased in violation of the contract. *Prieur v. Depouilly*, 8 La. Ann. 399. So, it is held that a tender of the amount due on a joint and several promissory note, by a surety, while an action brought by the holder against the principal is pending, will not discharge the surety, unless he also offers to indemnify the holder against the costs of such action. *Hampshire Manuf. Bank v. Billings*, 17 Pick. 87.

§ 6. **To whom made.** A tender to the creditor in person will always be made to the proper party. And if the money is due to several persons jointly, it may legally be tendered to either of them, though it must be pleaded as a tender to them all. *Douglass v. Patrick*, 3 Term R. 683; *Oatman v. Walker*, 33 Me. 67. A presentation of papers to one of two partners and tender of money, such presentation and tender relating to land purchased by them for partnership purposes, was held to be of the same legal effect as presentation to both. *Prescott v. Everts*, 4 Wis. 314.

But to constitute a valid tender, it must be made to the creditor himself, or to some one authorized to receive it in his behalf. *Goodland v. Blewith*, 1 Camp. 477; *Kirton v. Braithwaite*, 1 Mees. & W. 310; *Hornby v. Cramer*, 12 How. (N. Y.) 490; *King v. Finch*, 60 Ind. 420. A tender to an agent duly authorized to receive payment is, of course, as good as a tender to the creditor in person. *Id.*; *Smith v. Goodwin*, 4 Barn. & Ad. 413. And a tender to an assignee of a debt or demand is a good tender. *Goodland v. Blewith*, 1 Camp. 477. So, a tender to a merchant's clerk, at the store for goods previously bought there, is good, although the claim had then been left with an attorney for collection. *Hoyt v. Byrnes*, 11 Me. 475. A tender is also valid if made to an attorney with whom the claim has been left for collection. *Crozer v. Pilling*, 4 Barn. & Cres. 26; *Jackson v. Crafts*, 18 Johns. 110; *Billiott v. Robinson*, 13 La. Ann. 529. And

if an attorney, with whom a demand is left for collection, writes a letter demanding payment at his office, a tender by the debtor to any person in charge of the office, in the attorney's absence, is valid. *Wil-mot v. Smith*, 3 Carr. & P. 453; *Oatman v. Walker*, 33 Me. 67. But if, in such case, the attorney had written a letter demanding payment to himself, instead of generally, at his office, a tender to a writing clerk in the office would not have been valid. *Watson v. Hetherington*, 1 Carr. & Kir. 36. A tender to one, who is in fact the attorney of the creditor, although he denies his authority, is a good tender. *McIniffe v. Wheelock*, 1 Gray, 600. So, where a creditor told his clerk, who had been previously authorized to receive the money, not to receive a certain sum, if it should be offered him by a certain debtor, for that he had put the matter into the hands of his attorney, and the clerk on tender made refused to receive the money, and stated the reason, it was held that this was a good tender to the principal. *Moffat v. Parsons*, 5 Taunt. 307.

Where an agent of the defendants had been notified not to receive a tender, but to refer the plaintiff to a third person named, of which the plaintiff had notice, it was held that on such a state of facts the plaintiff might seek the person to whom he had been so referred, or the defendants, at his election, and make a proper tender to either. *Hoyt v. Hall*, 3 Bosw. (N. Y.) 42.

Money due a *cestui que trust* should be tendered to a trustee. *Chahoon v. Hollenback*, 16 Serg. & R. (Penn.) 425. A tender to an executor, even before he has proved the will, is held to be good provided he afterward prove it. Bac. Abr., Tender (E.); 2 Chit. on Cont. (9th ed.) 1188. But where one of the defendants made a tender of the debt to the plaintiff's executor, while in another State, before he had acted, or was qualified to act, as executor, a refusal to accept the money thus offered was held not to bar the recovery of interest. *Todd v. Parker*, 1 N. J. Law, 45.

Where the plaintiff's son was sent to demand a specific sum for an unliquidated claim, it was held that an offer to him of a less sum could not be considered as a tender to the plaintiff. *Chipman v. Bates*, 5 Vt. 143.

A tender to a clerk of a sub-agent of the creditor is held to be insufficient, unless it is shown that such clerk had authority to receive the money. *Hargous v. Lahens*, 3 Sandf. (N. Y.) 213.

§ 7. **Time of making a tender.** It is the rule of the common law, that a tender must be made on the very day on which the money is due, if that day is fixed or made certain by the contract (*Dixon v. Clark*, 5 C. B. 365; *Powe v. Powe*, 42 Ala. 113; *Toulmin v.*

Sager, id. 127); and a tender of money before it is due is of no avail, as the creditor is not bound to receive it before it is due, according to the terms of the contract. *Tillou v. Britton*, 4 Halst. (N. J.) 120; *Saunders v. Frost*, 5 Pick. 267; *Mitchell v. Cook*, 29 Barb. 243. But it was held in a Maryland case that, if the debt does not draw interest, a tender before the day of payment would be good. *McHard v. Whetcroft*, 3 Harr. & McH. (Md.) 85. And by the common law of Connecticut a tender is good, after the day of payment has elapsed. *Tracy v. Strong*, 2 Conn. 659. But see *Maynard v. Hunt*, 5 Pick. 240; *Powe v. Powe*, 42 Ala. 113.

When the money is not to become due on a fixed day, nor until a demand has been made, no tender need be made before such demand, since the money will not be due before that time. But where money is to be due or payable on or before a specified day, a tender may be made at any time before the day fixed, because the debtor has an option to pay on that day or before that time, if he so elects. See *Leftley v. Mills*, 4 Term R. 170; *Startup v. Macdonald*, 6 Man. & Gr. 593. A tender before an action is actually commenced is sufficient, even though the creditor has placed the demand in the hands of an attorney, who has made out the papers for commencing the action, and has also placed them in the sheriff's hands for service. *Hull v. Peters*, 7 Barb. 331; *Randall v. Bacon*, 49 Vt. 20; 24 Am. Rep. 100; *Knight v. Beach*, 7 Abb. (N. S.) 241, 249. See *Briggs v. Calverly*, 8 Term R. 629; *Kington v. Kington*, 11 Mees. & W. 233; *Pigot v. Cubley*, 15 C. B. (N. S.) 701.

Where money is received by one person for the use of another, and it ought, by law, to be paid over without delay and without demand, a tender of the money may be made at any time. And it ought to be done promptly if the person receiving it would avoid the payment of interest and costs, from the time it ought to have been paid or tendered. *Stacy v. Graham*, 14 N. Y. (4 Kern.) 492.

A distinction which is said to prevail in all the cases is, that "where a thing is to be done *anywhere*, a tender a convenient time before midnight is sufficient; where a thing is to be done *at a particular place*, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by day-light, and a convenient time before sunset." PARKE, B., in *Startup v. Macdonald*, 6 M. & Gr. 593. In the case of a bill of exchange, the acceptor has the whole of the last day, until twelve o'clock at night, to pay it. Id.

A tender after sundown of the day on which the payment, under a contract whereof time was of the essence, was due, was held to be sufficient in *McClartey v. Gokey*, 31 Iowa, 505.

§ 8. **Where to be made.** Where the contract provides, in express terms, that payment of a sum of money shall be made at a particular place, a tender at that place will be sufficient, but it will not be valid at any other. But where no place of payment is mentioned, and the debt is due in money, a tender to the person is good (*Slingerland v. Morse*, 8 Johns. 474; *Bates v. Bates*, Walk. [Miss.] 401), and the debtor is bound to seek the creditor wherever he may be within the State, and make or tender payment to him there. *Littell v. Nichols*, Hard. (Ky.) 71; *King v. Finch*, 60 Ind. 420. But on a contract made in one State of the Union for the payment of money, the debtor is not bound to go to another State to tender the money to the creditor. *Allshouse v. Ramsey*, 6 Whart. (Penn.) 331.

It is a well-settled principle as it regards rent, payable in money or kind, that where the contract is silent as to the place of payment, a tender on the land is good, and it is not required of the lessee to make a tender to the person. And the reason is, that rent issuing out of the land savors so far of the realty that it is payable on the leased premises. *Walter v. Dewey*, 16 Johns. 222. And see *Hunter v. Le Conte*, 6 Cow. 728.

§ 9. **Of the thing tendered.** When a debt is payable in money nothing else is a lawful tender in discharge of the obligation. Tender, to be effectual, must be made in such funds or currency as the payee has a legal right to demand. *Durham v. Roberts*, 33 Ga. (Supp.) 123. The common law required a tender to be made in the current coin of the realm, or in foreign money legally made current by proclamation. *Wade's Case*, 5 Co. 114; *Case of Mixed Moneys*, Davys (Ir.), 18. See below, Art. 2.

A creditor is not bound, nor is he even at liberty, to accept in payment money which the debtor has fraudulently obtained, and, therefore, a tender of money, obtained by the president of a bank, by embezzlement, is not a lawful tender by him to his creditor. *Reed v. Bank of Newburgh*, 6 Paige, 337.

See, as to tender of chattels, *post*, p. 598, Art. 2, § 18.

ARTICLE II.

MODE OF MAKING A TENDER.

Section 1. In general. The defense of tender is allowed upon the principle that the creditor might have received his money without action if he would, and, therefore, the law will neither encourage nor justify him in making unnecessary costs for his debtor to pay. But

the defense is a rigorous one, and before the debtor will be permitted to avail himself of it, he must show that he has fully complied with the requirements of the law in relation to a tender. See 1 Wait's L. & Pr. 1046. Thus, one designing to make a fair offer of the money due upon a mortgage, by way of tender and payment, and with the purpose of insisting, in case of refusal, that the lien is thereby discharged, is bound to act in a straight-forward way, and distinctly and fairly make known his true purpose, without mystery or ambiguity, and allow reasonable opportunity for intelligent action by the holder of the mortgage. *Potts v. Plaisted*, 30 Mich. 149; *Proctor v. Robinson*, 35 id. 284. The requisites of a good and sufficient tender will be more fully considered in the following sections.

§ 2. **In what money.** We have seen, *ante*, p. 582, Art. 1, § 9, that, at common law, a tender, to be strictly legal, must be made in the coin of the realm. See, also, *Polglass v. Oliver*, 2 C. & J. 15; S. C., 2 Tyrw. 89. So, the Constitution of the United States provides that no State shall make any thing but gold and silver coin a tender in payment of debts. U. S. Const., Art. 1, § 10. And a statute of a State making bank notes receivable in payment of executions, or in redeeming land sold on execution, was held to be unconstitutional and void. *Lowry v. McGhee*, 8 Yerg. (Tenn.) 242. But, in Maryland, tobacco was formerly considered as money, in judicial proceedings, and, in actions of debt, tobacco and money counts were joined. *Crain v. Yates*, 2 Har. & G. (Md.) 332.

By the early acts of congress, the only strictly legal tender was coined money. But the prohibition in the Constitution of the United States, which declares that no State shall have the power to make any thing but gold and silver a legal tender, does not apply, in terms, to the government of the United States. By the omission in the national Constitution to declare what shall or shall not be a legal tender, and the prohibition to the States to make any thing besides gold and silver a legal tender, the power, by necessary implication, is conferred on the general government. *Wilson v. Morgan*, 30 How. (N. Y.) 386; S. C., 4 Robt. 58; 1 Abb. (N. S.) 174. Hence, at different periods, congress has designated what should be legal tender, and by the enactment of statutes of a comparatively recent date, money, other than gold or silver coin, was made a legal tender in payment of debts between private persons. See *post*, p. 585, § 5.

§ 3. **In bank bills.** Bank notes are not a lawful tender in fulfillment of a contract to pay money. *Donaldson v. Benton*, 4 Dev. & B. (No. Car.) Law, 435; *Jones v. Mullinix*, 25 Iowa, 198. But a tender in solvent, current bank bills has been held sufficient, where the party

to whom they were tendered made no objection to the kind of money offered, but placed his objection upon a different ground, as that it was not enough, or upon some other similar objection. *Polglass v. Oliver*, 2 C. & J. 15; S. C., 2 Tyrw. 89; *Saunders v. Graham*, Gow. 111; *Cooley v. Weeks*, 10 Yerg. (Tenn.) 141; *Snow v. Perry*, 9 Pick. 539, 542; *Brown v. Simons*, 44 N. H. 475; *Fosdick v. Van Husan*, 21 Mich. 567. Where bank notes were offered in payment, and the payee said he would as soon receive them as specie, the tender was held to be good. *Wheeler v. Knaggs*, 8 Ohio, 169. And a tender of a bank check in payment of a debt, where all objection merely on account of its being a check is waived, and the amount only is objected to, is a good tender. *Jennings v. Mendenhall*, 7 Ohio St. 257; *Jones v. Arthur*, 8 Dowl. P. C. 442.

If gold or silver is tendered, that will be a legal tender, whether objected to or not; and nothing is strictly a legal tender unless the party offering it can insist that it is a valid and legal tender of itself, as in the case of a tender in gold or silver, or, in a proper case, in a medium made a legal tender by act of congress. See *Thorndike v. United States*, 2 Mas. (C. C.) 1. A legal tender cannot be made in cents, under the Constitution of the United States. *McClurin v. Nesbit*, 2 Nott & M. (So. Car.) 519. So, on a bond for lawful money of North Carolina, it was held that bills of credit issued by that State were not a legal tender. *Shelby v. Boyd*, 3 Yeates (Penn.), 321. And a tender of an entire sum in State scrip, when a part was payable in money and a part in scrip, is bad as to the whole. *White v. Prigmore*, 29 Ark. 208. Where an attorney collected paper money in lieu of specie, without authority, he was held responsible as for a failure to collect it. *Wickliffe v. Davis*, 2 J. J. Marsh. (Ky.) 69. And it was held that a national bank is not bound to receive its own issue as a State bank, in its own proper business, the notes themselves not being a legal tender. *Thorp v. Wegefarth*, 56 Penn. St. 82.

§ 4. **Depreciated or uncurrent money.** The doctrine of the preceding section, that bank bills are a good tender, unless objected to at the time, on the ground that they are not money, only applies to *current* bills, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered. Notes not thus current at their par value, nor redeemable on presentation, are not a good tender to principal or agent, whether they are objected to at the time or not. See cases cited above; also, *Ontario Bank v. Lightbody*, 13 Wend. 101, 105. Thus, where a bond was made payable at the "office of discount and deposit" of a certain bank, it was held that the bank could not receive, in payment of such bond, notes that

were not current at their par value, and that such notes could not constitute a valid tender of the amount due, whether they were objected to at the time or not. *Ward v. Smith*, 7 Wall. 447. See *ante*, p. 408, tit. *Payment*, Art. 2, § 6.

Exchange on foreign money should be calculated according to the rate at the time of trial. *Lee v. Wilcocks*, 5 Serg. & R. 48.

A debt due at the time of the depreciation of the currency, which was not paid at the time, must be paid in full, without noticing the depreciation. *McNair v. Ragland*, 1 Dev. (No. Car.) Eq. 516. The tender and refusal of notes that are worthless avail nothing. *Roget v. Merritt*, 2 Caines (N. Y.), 116.

§ 5. **U. S. greenbacks.** By the acts of congress of 1862 and 1863 certain treasury notes of the United States, commonly called "greenbacks," were made a legal tender in payment of debts between private persons; and these acts have been declared to be constitutional and valid, not only as to debts contracted after their passage, but also as to those entered into before that event, and when coined money was the only legal tender. *Verges v. Giboney*, 38 Mo. 458; *George v. Concord*, 45 N. H. 434; *People v. Cook*, 44 Cal. 638; *Murray v. Harrison*, 47 Barb. 484; *Murray v. Gale*, 52 id. 427; S. C., 5 Abb. (N. S.) 236; *Metropolitan Bank v. Van Dyck*, 27 N. Y. (13 Smith) 400; *Black v. Lusk*, 69 Ill. 70; *Knox v. Lee*, 12 Wall. 457; *Parker v. Davis*, 12 id. 457. See, also, *Carpenter v. Northfield Bank*, 39 Vt. 46; *O'Neil v. McKewn*, 1 So. Car. 147; *Johnson v. Ivey*, 4 Coldw. (Tenn.) 608; *Shollenberger v. Brinton*, 52 Penn. St. 9. Thus, legal tender treasury notes of the United States were offered in payment of a judgment rendered in 1858, and it was held that the tender was good and that the judgment plaintiff could not refuse the treasury notes and demand payment in coin. *Bowen v. Clark*, 46 Ind. 405. So, a direct offer of the share due on a recognizance to the party entitled, by the recognizor, in a roll of legal-tender notes, held out in his hand without stating the amount, and peremptorily refused without inquiring the amount, was held to be a good and sufficient tender in law. *State v. Spicer*, 4 Houst. (Del.) 100. And it is held in Ohio that United States treasury notes are a lawful tender upon contracts stipulating, in general terms, for payment of money, although the contract was made before the passage of the legal-tender acts; and, although the question arises in equity and not at law, and although the payment is made to secure an option reserved in a contract, and not in discharge of an absolute indebtedness. *Longworth v. Mitchell*, 26 Ohio St. 334.

It is, however, held that taxes imposed by a State government upon the people of the State are not "debts," within the meaning of the

legal-tender acts. *Lane County v. Oregon*, 7 Wall. 71; *Perry v. Washburn*, 20 Cal. 318. But see *Haas v. Misner*, 1 Idaho T. 203; *Rhodes v. O'Farrell*, 2 Nev. 60. And where a contract by its terms clearly implies that the payment should be made in gold or silver, or coined money, a tender of United States treasury notes on such a contract is not a valid tender. *Bronson v. Rodes*, 7 Wall. 229; *Trebilcock v. Wilson*, 12 id. 687; *Rankin v. Demott*, 61 Penn. St. 263; *McGoon v. Shirk*, 54 Ill. 408; 5 Am. Rep. 122; *Independent Ins. Co. v. Thomas*, 104 Mass. 192; *Vilhac v. Biven*, 28 Cal. 410. Since the passage of the legal-tender acts, when a person promises, for any valid consideration, to return gold or silver instead of the national currency, he is bound to return those specific things precisely as he would be bound to return a specific quantity and quality of any other commodity, if he had promised to do so for a valid consideration. *Bank of Commonwealth v. Van Vleck*, 49 Barb. 508. And see *Luling v. Atlantic Mut. Ins. Co.*, 50 id. 520; S. C. affirmed, 51 N. Y. (6 Sick.) 207; *Wright v. Jacobs*, 61 Mo. 19; *Linn v. Minor*, 4 Nev. 462. But, although since these acts, an undertaking to pay in gold may be *implied*, and be as obligatory as if made in express words, yet the implication must be found in the language of the contract, and cannot be gathered from the mere *expectations* of the parties. *Maryland v. Baltimore, etc., R. R. Co.*, 22 Wall. 105.

In New York, a mortgage was executed before the passage of the legal-tender act. After the decision of the supreme court of the United States in *Hepburn v. Griswold*, 8 Wall. 605, declaring the act void as to contracts made prior to its passage, the grantee of the mortgagor tendered payment of the mortgage debt in legal tender notes, which the mortgagee refused. Subsequently, the United States supreme court reversed its decision, in *Knox v. Lee*, 12 Wall. 457, and it was held that the tender did not discharge the lien of the mortgagee, it being insufficient according to the law as then declared. *Harris v. Jex*, 55 N. Y. (10 Sick.) 421; 14 Am. Rep. 285.

And that the State courts ought to follow the latest decision of the supreme court of the United States, upon the validity of the legal-tender acts of congress, see *Smith v. Wood*, 37 Tex. 616; *Smith v. Smith*, 1 N. Y. Sup. Ct. (T. & C.) 63; *Townsend v. Jennison*, 44 Vt. 315; *Barringer v. Fisher*, 45 Miss. 200.

§ 6. **Confederate money.** See *ante*, p. 406, tit. *Payment*, Art. 2, § 3. It was held in Louisiana, that a tender of Confederate money in payment would not avail the defendant, although such money was the circulating currency at the time in the community. *Graves v. Hardesty*, 19 La. Ann. 186. See, also, *Parker v. Broas*, 20 id. 167. So, a

tender of Confederate money in 1863, at its nominal value, in payment of a note due in 1857, was held, in North Carolina, not to be a legal tender for any purpose. *Love v. Johnston*, 72 No. Car. 415. See *Tate v. Smith*, 70 id. 685.

§ 7. **Production of the money.** In order to constitute a sufficient tender, there must either be an actual production of the money (*Ladd v. Patten*, 1 Cranch's C. C. 263; *Walker v. Brown*, 12 La. Ann. 266; *Englander v. Rogers*, 41 Cal. 420; *Camp v. Simon*, 34 Ala. 126); or the production of it must be dispensed with by the express declaration or an equivalent act of the creditor. *Id.*; *Thomas v. Evans*, 10 East, 101; *Leatherdale v. Sweepstone*, 3 Carr. & P. 342; *Strong v. Blake*, 46 Barb. 227; *Sands v. Lyon*, 18 Conn. 18. Great importance is attached to the production of the money, as the sight of it might tempt the creditor to yield. *Finch v. Brook*, 1 Bing. N. C. 253. It is not enough to show that the debtor had the money in his pocket, and that he informed his creditor that the money was ready for him, and that he asked him to take the money, when it also appears that the money was not shown to the creditor. Under such circumstances, a creditor is not bound to say whether he will take the money or not, until it is actually produced and offered to him. *Bakeman v. Pooler*, 15 Wend. 637. See, also, *Leatherdale v. Sweepstone*, 3 Carr. & P. 342; *Steele v. Biggs*, 22 Ill. 643; *Eastman v. Rapids*, 21 Iowa, 590; *Breed v. Hurd*, 6 Pick. 356; *Strong v. Blake*, 46 Barb. 228. And having money in bank sufficient to meet a note will not support a plea of tender, unless the fund was in some way appropriated to the note. *Myers v. Byington*, 34 Iowa, 205. It has however been held that an offer of money, in bags, is a legal tender, and that it is the duty of the receiver to count it, and see that there is enough. *Behaly v. Hatch*, 1 Walk. (Miss.) 369. So, where a person offers a sum of money, by way of tender, and states the precise sum he so offers, which he holds in his hand, it is held to be a sufficient tender, although it is twisted up in bank notes and not shown to the party. *Alexander v. Brown*, 1 Carr. & P. 288. But it is not enough that a third person has the money on the spot, which he would loan, unless he actually consents to loan it for the purpose of the tender. *Sargent v. Graham*, 5 N. H. 440.

In an Illinois case, a party, having executed to Myron Lodge No. 1, of the Old Free Order of Chaldea, a certain promissory note, stated that after the maturity of the note he offered in open lodge of said Order to the said lodge itself, and members present, to pay the note and interest; that they then and there refused to take the money and gave him further time without his wish, knowing that, at the time he so offered to

pay the note and interest, he had the money to do it with; and it was held that the offer to pay in the manner stated did not amount to a tender. *Liebrandt v. Myron Lodge, etc.*, 61 Ill. 81.

It is, however, the general rule, that, in making a tender, actual production of the money is not necessary, if the defendant refuses to receive it. *Appleton v. Donaldson*, 3 Penn. St. 381; *Jackson v. Jacob*, 3 Bing. N. C. 869; *Hazard v. Loring*, 10 Cush. 267. And if, on an offer of a sufficient sum, the creditor refuses to accept it, unless the debtor will also pay another demand, this will waive an actual offer of the money, and be a valid tender. *Douglass v. Patrick*, 3 Term R. 683. See, also, *Cornwell v. Haight*, 21 N. Y. (7 Smith) 462. But where a creditor refuses to receive the sum actually due, on the ground that he claims a larger sum, this will not dispense with an actual offer, by the debtor, of the amount really due. *Dunham v. Jackson*, 6 Wend. 22, 34. But see *Black v. Smith*, Peake, 88; *Cudman v. Lubbock*, 5 Dowl. & Ry. 289; *Rudolph v. Wagner*, 36 Ala. 698; *Thorne v. Mosher*, 20 N. J. Eq. 257.

A tender of money, which the person to whom it is tendered refuses to accept, but, upon its being left with him against his wish, afterward refuses to give up, is sufficient. *Rogers v. Rutter*, 11 Gray, 410.

If a creditor calls upon his debtor to receive payment, and while he is counting the money the debtor tells him that his claim is extortionate. he is justified in leaving the premises, and though the money is laid out before him, it is no tender. *Harris v. Mulock*, 9 How. (N. Y.) 402.

§ 8. **Requiring change.** A tender is not objectionable on account of being of a larger sum than the amount due. *Dean v. James*, 4 B. & Ad. 547; *Patterson v. Cox*, 25 Ind. 261. But a tender of a larger sum, requiring change, is not a good tender of a smaller sum. *Robinson v. Cook*, 6 Taunt. 336. Thus, a plea of tender of a half-year's rent simply is not supported by evidence of a tender of the half-year's rent requiring the lessor to get change and pay back the property tax. *Id.* Nor is it a good tender of a fractional sum for the debtor to offer the creditor a bank note to a larger amount, and to desire him to take out of that the sum to be paid. *Betterbee v. Davis*, 3 Camp. 70.

§ 9. **Demanding receipt.** A tender must be unconditional and unqualified, and, if there is either an express or implied demand of a receipt, or that the money shall be received in full, it will not be a sufficient tender. *Holton v. Brown*, 18 Vt. 224; *Thayer v. Brackett*, 12 Mass. 450; *Wood v. Hitchcock*, 20 Wend. 47; *Sanford v. Bulkley*, 30 Conn. 344; *Perkins v. Beck*, 4 Cranch's C. C. 68; *Laing v. Meader*, 1 Carr. & P. 257; *Griffith v. Hodges*, 1 id. 419; *Finch v. Miller*, 5 C. B. 428; *Roosevelt v. Bull Head Bank*, 45 Barb. 579. But where a creditor,

on a tender being made, refused to receive the money, on account of more being due, it was held that he could not afterward object to the tender, on the ground that the party making it required a receipt. *Richardson v. Jackson*, 8 Mees. & W. 298; S. C., 9 Dowl. P. C. 715. So, where a sufficient tender is made in a letter which requests that a receipt may be sent back, such request does not vitiate the tender, for it is not a condition. *Jones v. Arthurs*, 8 Dowl. P. C. 442.

§ 10. **Must be unconditional.** As a general rule, a tender must be without qualifications or conditions (*Smith v. Keels*, 15 Rich. (So. Car.) 318); and if any terms not embraced in the contract be added which the acceptance of the money would cause the other party to admit, the tender is not good. *Hastings v. Thorley*, 8 Carr. & P. 573; *Bevans v. Rees*, 5 M. & W. 306; S. C., 7 Dowl. P. C. 510; *Shaw v. Sears*, 3 Kans. 242; *Cothran v. Scanlan*, 34 Ga. 555; *Pulsifer v. Shepard*, 36 Ill. 513. See *Potter v. Douglass*, 44 Conn. 541. A tender is valid if it implies merely that the party offers a given sum as being all that he admits to be due, but if it implies also that if the other party takes the money he is required to admit that no more is due, the tender is conditional and insufficient. *Bowen v. Owen*, 11 Q. B. 130. An offer of a certain sum as a present, with a denial that it is justly due (*Sutton v. Hawkins*, 8 Carr. & P. 259; but see *Scott v. Uxbridge, etc., Co.*, L. R., 1 C. P. 596); or an offer in full settlement and discharge of all demands (*Strong v. Harvey*, 3 Bing. 304; *Wood v. Hitchcock*, 20 Wend. 47), would not be a good tender. *Id.*; *Draper v. Hitt*, 43 Vt. 439; 5 Am. Rep. 292; *Nye v. Chase*, 50 Vt. 306. And we have already seen in the preceding section that a tender coupled with a condition, that the creditor will give a receipt or a release in full, is insufficient. See, also, *Clark v. Mayor of New York*, 1 Keyes (N. Y.), 9. But see *Brock v. Jones*, 16 Tex. 461.

A tender upon condition that certain securities, to which the debtor is not entitled, shall be rendered to him, is defective. *Brooklyn Bank v. DeGrauw*, 23 Wend. 342. So, a tender of the amount due upon a note, made upon the condition that the holder will ratify an arrangement which has been made concerning another matter (*Eddy v. O'Hara*, 14 Wend. 221), or upon condition that the holder will dismiss an action against the maker in no way connected with the note (*Rose v. Duncan*, 49 Ind. 269), is bad. See, also, *Harris v. Mulock*, 9 How. (N. Y.) 402. So, tender of the amount due upon a promissory note secured by a mortgage on real estate, made upon the condition that such mortgage shall be released or canceled, is insufficient. *Storey v. Krewson*, 55 Ind. 397; 23 Am. Rep. 668.

But in the case of commercial paper, the authorities seem to be uni-

form, that a tender upon condition that the paper shall be surrendered, is good, because such paper might be put in circulation, after payment and innocent parties become liable. The indorser of a negotiable note may, therefore, insist upon a surrender of the note to him as a condition of its payment. *Wilder v. Seelye*, 8 Barb. 408. And see *Storey v. Krewson*, 55 Ind. 397; 23 Am. Rep. 668. So, the acceptor of a bill of exchange is not bound to pay it unless the holder produces the bill, and offers to give it up on payment of the amount due upon it. *Hansard v. Robinson*, 7 Barn. & Cres. 90. So, the maker of a negotiable promissory note may require its delivery to him as a condition of its payment. *Smith v. Rockwell*, 2 Hill, 482. And see *Ocean Nat. Bank of N. Y. v. Fant*, 50 N. Y. (5 Sick.) 474. So where a negotiable note is made by two persons jointly, if either of them pays the note, he is entitled to the possession of the note on payment thereof, so that he may use it as a voucher as against the other joint maker. *Cahoon v. Bank of Utica*, 7 N. Y. (3 Seld.) 486.

But where the holder of a bill of exchange has other claims upon it, against other parties than the one making the tender, the latter when making a tender can only require an exoneration of himself to be indorsed on the bill, and he is not entitled to its possession. *Hargous v. Lahens*, 3 Sandf. (N. Y.) 213.

Where a tender is accompanied by a condition on which the debtor has a right to insist, and to which the creditor has no right to object, such a condition does not vitiate the tender. *Wheelock v. Tanner*, 39 N. Y. (12 Tiff.) 481. The question, as to whether a tender was made conditionally or not, is for the jury. *Marsden v. Goole*, 2 Carr. & Kir. 133.

§ 11. **Tender under protest.** An offer to pay under protest the sum claimed is a good tender. *Manning v. Lunn*, 2 Carr. & Kir. 13; *Scott v. Uxbridge, etc., Railway Co.*, L. R., 1 C. P. 596.

If a debtor tenders to his creditor a sum of money, in full for all legal claims which the creditor may have against him upon account, and the creditor receives the money, protesting that it is not sufficient, but saying that he will take it and pass it to the debtor's credit upon the account, and the debtor does not express any dissent to this course, the acceptance of the tender will be no bar to the creditor's right to recover such sum as may be found due to him, exceeding the amount of the tender. *Gassett v. Andover*, 21 Vt. 342.

§ 12. **Tender of entire demand.** A tender of part of an entire demand is inoperative (*Dixon v. Clarke*, 5 C. B. 365; 5 Dowl. & L. 155; *Helphrey v. Chicago, etc., R. R. Co.*, 29 Iowa, 480; *Baker v. Gasque*, 3 Strobb. [So. Car.] 35), and is not rendered valid by the debtor

having a set-off for the balance. *Searles v. Sadgrove*, 5 El. & Bl. 639. But a tender of a gross sum upon several demands, without designating the amount tendered upon each, is sufficient. *Thetford v. Hubbard*, 22 Vt. 440. See *Boyden v. Moore*, 5 Mass. 365. Or if the debts are entirely separate, as in the case of several promissory notes, bills of exchange, bonds or separate sums of money otherwise distinct, the debtor has a right to elect such of them as he is willing to pay, and make a tender of them, omitting the others. *Id.* Under a contract for the payment of money without the mention of interest, a tender of the money without interest is good; and if interest was to be paid, such a tender, if not objected to on that ground, is not afterward subject to that objection. *Connell v. Mulligan*, 21 Miss. (13 S. & M.) 388. See *Hamar v. Dimmick*, 14 Ind. 105. A tender of a sum actually due on a bond, after a breach, though less than the penalty, is a sufficient tender. *Tracy v. Strong*, 2 Conn. 659. But a tender, to be available, must include the accrued costs (*Barnes v. Greene*, 30 Iowa, 114); and a plea of tender, after suit brought, which does not include the costs which had then accrued, is fatally defective. *Freeman v. Fleming*, 5 id. 460.

An offer made to pay the amount of freight due, deducting the loss on account of improper storage, the amount of such loss to be ascertained by arbitration, is held to be a good tender. *Dedekam v. Vose*, 3 Blatchf. (C. C.) 44.

Where a plaintiff tenders to a defendant the amount of a first installment in gold, accompanied with bonds and mortgages, and the defendant refuses to take them, it is held to be a sufficient tender of the latter, although the defendant does not examine them to see that they are correct. *Hanna v. Phillips*, 1 Grant's (Penn.) Cas. 253.

The innocent mistake of a debtor in tendering a sum less than the actual debt is the debtor's misfortune, and does not affect the creditor's right to recover the balance unpaid. *Patnote v. Sanders*, 41 Vt. 66. See, also, *Helphrey v. Chicago, etc., R. R. Co.*, 29 Iowa, 480.

But when a tender is made which is not entirely sufficient in amount, and the amount due is not known to the plaintiff, making the tender, but is within the exclusive knowledge of the defendant, to whom the tender is made, who refused to communicate the same; and there is evidence tending to show a waiver by the defendant of the actual production of a greater amount of money than the amount tendered, it is not error for the court to refuse to instruct the jury that the plaintiff cannot recover, for the reason that the amount of his tender was not sufficient. *Nelson v. Robson*, 17 Minn. 284.

§ 13. **Keeping tender good.** The principle of the plea of tender

is, that the defendant has been always ready to perform, entirely, the contract on which the action is founded; and that he did perform it as far as he was able, by tendering the requisite money, the plaintiff himself having precluded a complete performance, by refusing to accept it. *Dixon v. Clark*, 5 C. B. 365, 377; *Hesketh v. Fawcett*, 11 Mees. & W. 356. Accordingly, if the plaintiff can show that an entire performance of the contract was demanded and refused, at any time when, by the terms of it, he had a right to make such a demand, he will avoid the plea, whether such demand and refusal took place before or after the tender. *Id.*; *ante*, p. 576, Art. 1, § 1; *Rose v. Brown*, Kirby (Conn.), 293. And where a proper tender is made by two joint debtors, which was refused, yet it was held that a subsequent demand of the amount from one of the debtors invalidated the tender as to both. *Peirse v. Bowles*, 1 Stark. 323.

When a debtor has made a tender of money, in pursuance of the terms of a contract, it is his duty to keep the money safely, so as to be prepared at all times to produce it when required, to keep his tender good. *Call v. Scott*, 4 Call (Va.), 402; *Stow v. Russell*, 36 Ill. 18; *Pulsifer v. Shepard*, 36 id. 513. He is, however, at liberty to use it as his own; all he is under obligation to do is, to be ready at all times to pay the debt in current money when requested. *Curtiss v. Greenbanks*, 24 Vt. 536. And it is not necessary to prove, under a plea of tender, that the *identical* money tendered was kept and brought into court. *Colby v. Stevens*, 38 N. H. 191. So, in tendering back money for the purpose of rescinding the arrangement under which it had been received, it is immaterial whether the bills tendered back are the identical ones received or not, since in law one dollar in money is the equivalent of any other dollar. *Michigan, etc., R. R. Co. v. Dunham*, 30 Mich. 128.

It has, however, been doubted whether a tender is good when it appears that the money tendered was afterward used by the debtor in his own business, and mingled with his other money. And it was held that, when bills are tendered in payment and not objected to, the same bills should be brought into court. *Roosevelt v. Bull's Head Bank*, 45 Barb. 579.

In an equitable action, where a party relies upon a tender of money it is sufficient, to keep such tender good, that he offers to bring the money into court, and is ready to comply with the directions of the court in regard to it. *Breitenbach v. Turner*, 18 Wis. 140. And see *Livingston County v. Henneberry*, 41 Ill. 180.

When a tender is made of a greater sum than is due, it is not necessary to pay or keep good the whole amount of such tender. *Abel v. Opel*, 24 Ind. 250.

§ 14. **Waiver of strict tender.** A tender may be waived or dispensed with by words or acts, and may be excused by circumstances or by omissions of the party to whom it should otherwise have been made. *Holmes v. Holmes*, 12 Barb. 137; S. C. affirmed, 9 N. Y. (5 Seld.) 525; *Mattocks v. Young*, 66 Me. 459. Thus, a party who declares positively, when an offer is made to pay him, that nothing is due him, and that he will accept no money, thereby effectually excuses any tender, and is not entitled afterward to object that money was not particularly counted out and presented to him, which he had declared in advance he would not take. *Lacy v. Wilson*, 24 Mich. 479. And see *Brewer v. Fleming*, 51 Penn. St. 102; *Wesling v. Noonan*, 31 Miss. 599; *Barker v. Parkenhorn*, 2 Wash. (C. C.) 142; *Dorsey v. Barbee*, 6 Litt. (Ky.) 204. And the refusal to receive an amount proffered, on the ground of insufficiency, is a waiver of any informalities in a tender. *Whelan v. Reilley*, 61 Mo. 565. A offered to pay money to B, holding her purse in her hand, in sight of B, who saw the purse, but not the bills. A opened the purse and was in the act of taking out the bills, but stopped on account of the refusal of B to receive the money, and it was held that the offer was neither payment nor tender, but that the refusal was an excuse for not making the tender. *Thorne v. Mosher*, 20 N. J. Eq. 257. See *Ashburn v. Poulter*, 35 Conn. 553.

And though a debtor offers to pay a debt, with the ability to do so, yet if the creditor proposes to let it remain, and the debtor consents and retains the money, this is a waiver by the debtor of his tender, and he cannot set it up in his defense. *Terrell v. Walker*, 65 No. Car. 91.

Where a party designedly absents himself from home, for the fraudulent purpose of avoiding a tender, he cannot object that no tender was made. *Southworth v. Smith*, 7 Cush. 391. And a person to whom money was due having designedly evaded a tender, and brought his action so soon that it could not be made before the commencement of the action, this is a sufficient excuse for making no tender. *Gilmore v. Holt*, 4 Pick. 257.

So if, at the time of making a tender, the debtor has no knowledge of the commencement of a suit, and the creditor does not inform him thereof, nor make claim of costs, but refuses to accept the amount tendered solely on account of its insufficiency to pay the debt, it may be regarded as a waiver of all claim for costs. *Haskell v. Brewer*, 11 Me. 258.

So, in general, where a party places his refusal to accept tender on certain specific objections, he cannot, after action commenced, raise other objections, trifling in their character, and which could easily have

been remedied at the time. *Stokes v. Recknagel*, 6 Jones & Sp. (N. Y.) 368. See, also, *Adams v. Helm*, 55 Mo. 468.

Where a creditor is entitled to the payment of his debt in coin, and declares he will receive the amount in currency only at its value, or on account, and retain his claim for the difference, and the debtor, without objection, allows him to do so, the latter impliedly assents to the creditor's proposal. *Tyers v. United States*, 5 Ct. of Cl. 509.

§ 15. **Effect of a valid tender.** A tender of money in payment of a money debt, however formal and legal, will not extinguish the debt, though it will stop the running of interest, and protect the debtor from subsequent costs. *Moffat v. Parsons*, 5 Taunt. 307; *Woodruff v. Trapnall*, 12 Ark. 640; *Hamlett v. Tallman*, 30 id. 505; *Haynes v. Thom*, 28 N. H. 386; *Fuller v. Pelton*, 16 Ohio, 457; *Cornell v. Green*, 10 Serg. & R. (Penn.) 14; *Raymond v. Bearnard*, 12 Johns. 274. A tender of money is held to be an admission of a debt to the extent of the amount tendered, and the party tendering it will generally be liable for the amount tendered (*Fisher v. Moore*, 19 Iowa, 84; *Monroe v. Chaldeck*, 78 Ill. 429); and a jury cannot award less. *Sweetland v. Tuthill*, 54 id. 215. But see *Clarke v. Lyon Co.*, 7 Nev. 75. It is said that the effect of a common-law tender simply is, that if the plaintiff does not accept the money, and on the trial the defendant establishes his defense of tender, then such defense bars the recovery of all interest subsequent to the tender, and all costs, and entitles the defendant to costs, and does not in any event bar a recovery of the principal amount due, with interest to the day of tender. *Hill v. Place*, 7 Robt. (N. Y.) 389; S. C., 36 How. 26; 5 Abb. (N. S.) 18; affirmed, 48 N. Y. (3 Sick.) 520; *Kelly v. West*, 4 Jones & Sp. 304.

But the rule that a plaintiff is in any event entitled to recover the amount tendered by the defendant is held not to apply to an action brought to recover a penalty, of a fixed amount, and that alone. In such an action, unless the plaintiff recovers the amount of the penalty, he is not entitled to any judgment. *Canastota, etc., Plank Road Co. v. Parkill*, 50 Barb. 601.

If, after a tender and refusal, the debtor, in the presence of the creditor, and with his full knowledge, deposits the money with a third person to be paid to the creditor upon calling for it, the creditor is under no obligation to apply to the depository; and if the debtor upon a subsequent demand does not pay or tender the sum due, he loses the benefit of the previous tender. *Town v. Trow*, 24 Pick. 168.

So it is held that the tender of a sum of money, and an intimation by the payee of a willingness to receive it without actual reception of it, is not a payment nor does the property in the coin pass, but it is sub-

ject to be seized by an officer, on process against the party who has so tendered the money. *Thompson v. Kellogg*, 23 Mo. 281. And a tender less than the debt, though paid into court, should not be deducted from the debt in making up the judgment, but belongs solely to the defendant. *Meeker v. Hurd*, 31 Vt. 639. A party to a contract, on rescinding it, tendered a return of the consideration, but the other refused it, and sued for and recovered damages, and it was held that the sum tendered was not to be deemed paid and therefore to be deducted from the award. *Howard v. Hunt*, 57 N. H. 467. And see *Stowell v. Read*, 16 N. H. 20.

But a tender by a debtor, if received by the creditor, operates as a payment of the debt or claim on account of which it was tendered, to the amount of the sum received; and, if the tender is made on account of the debt and costs in a pending suit and is received, the creditor persists in his suit at the peril of future costs, if the sum received turns out to have been sufficient to pay the debt and costs at the time the tender was made. *Carpenter v. Welch*, 40 Vt. 251. See *Cockrill v. Kirkpatrick*, 9 Mo. 697; *Logue v. Gillick*, 1 E. D. Smith (N. Y.), 398; *Mitchell v. Merrill*, 2 Blackf. (Ind.) 87.

In Connecticut, a tender after day of payment is a defense to the action. *Tracy v. Strong*, 2 Conn. 659. And see *Ashburn v. Poulter*, 35 id. 553; *Call v. Lothrop*, 39 Me. 434.

A tender, regularly and lawfully made, discharges a lien, and while the debt is not thereby discharged without payment, yet the security is destroyed at once. The principle governing the subject is, that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the thing tendered, but he does lose all collateral benefits or securities. *Kortright v. Cady*, 21 N. Y. (7 Smith) 366. And in the case cited, this principle was applied to mortgages of real estate; the court holding, that a tender of the debt, either upon or after the law day, extinguishes the mortgage, and leaves the mortgagee only a creditor of the mortgagor. See, also, *Frost v. Yonkers Savings Bank*, 70 N. Y. (25 Sick.) 553; 26 Am. Rep. 627; *Van Housen v. Kanouse*, 13 Mich. 303; *Proctor v. Robinson*, 35 id. 284. So, a tender to a sheriff by the judgment debtor of the full amount collectible upon an execution in the hands of the former, discharges the lien of the execution upon property levied on by virtue thereof; and in case of a refusal to accept the tender, and a subsequent sale of the property under the execution, an action for conversion will lie. *Tiffany v. St. John*, 65 N. Y. (20 Sick.) 314; S. C., 22 Am. Rep. 612.

And the holder of a security upon which a party authorized makes a tender, is not concerned where or on what terms the person tendering the money obtained it, so long as he could have got payment by accepting the tender. *Eslow v. Mitchell*, 26 Mich. 500.

§ 16. **Demand after a tender.** Where the issue is on a subsequent demand and refusal to a plea of tender, the demand of the debt, to do away with the effect of the tender, must be by some one authorized to receive it, and to give the debtor a discharge. *Coles v. Bell*, 1 Camp. 478, n. And see *Coore v. Callaway*, 1 Esp. 115. This is held to be so even in replevin. *Pimm v. Grevill*, 6 id. 95.

After a tender of what is due from two persons on a joint contract, a subsequent application to one of them is sufficient to support a replication, that the plaintiff subsequently demanded payment from both. *Peirse v. Bowles*, 1 Stark. 323.

So, a letter demanding payment of a debt sent to the defendant's house, and to which an answer is returned that the demand should be settled, is held to be sufficient evidence of a demand, on the issue of a subsequent demand and refusal to a plea of tender. *Hayward v. Hague*, 4 Esp. 93.

§ 17. **Pleading a tender.** When a tender is relied on as a defense to an action for the breach of a contract to pay money, the object of the defense is to relieve the party from the payment of damages and costs, and, in some cases, to recover the costs incurred in the defense. See *ante*, p. 594, § 15; 1 Wait's L. & Pr. 1055; *Fuller v. Pelton*, 16 Ohio, 457. This defense, like that in every other case, must show such facts as will legally constitute a defense, so far as it is pleaded as such. And the facts alleged must be such as to show that the particular tender relied on was properly made. *Id.* Tender must be pleaded specially, and such plea must not only aver the offer to pay, but show a continued readiness to keep good the tender made. *Besancon v. Shirley*, 9 Sm. & M. 457; *Lyon v. Williamson*, 27 Me. 149; *Griffin v. Tyson*, 17 Vt. 35; *Barker v. Brink*, 5 Iowa, 481; *Whitlock v. Squire*, 10 Mod. 81; *Hume v. Peploe*, 8 East, 168. The plea must show that the defendant has always been ready to pay the money from the time when it first became due. *Id.* But it was held that a brief statement in the general issue, of a tender of money to the plaintiff, although informal as a plea of tender, inasmuch as it did not allege that the defendant had ever been ready to pay the money, was sufficient to authorize evidence of the tender to be given under it. *Clough v. Clough*, 26 N. H. 24. And tenders authorized by statute, after suits are commenced, and before their entry into court, are not to be pleaded, but

given in evidence under the general issue, in Vermont. *Woodcock v. Clark*, 18 Vt. 333.

If the right of action is founded upon the common counts, an answer of tender, with a payment of the amount into court, is an admission that the sum paid in is due on some contract, but not that the defendant is liable upon any particular contract upon which the plaintiff may choose to rely. *Charles v. Branker*, 12 Mees. & W. 743; *Archer v. English*, 1 Man. & Gr. 873. See *Smith v. Manners*, 5 C. B. (N. S.) 632. On the other hand, if the complaint is on a special contract the answer of tender, and the payment into court, is an admission of the cause of action as set forth, though it does not admit the amount of damages which may be therein alleged. *Wright v. Goddard*, 8 Ad. & El. 144; *Stoveld v. Brewin*, 2 B. & Ad. 116; *Johnston v. Columbian Ins. Co.*, 7 Johns. 315; *Spalding v. Vandercook*, 2 Wend. 431.

So, in actions for torts, if the complaint is special, as for an injury by a railway company, or other special cause of action, an answer of payment or tender admits the cause of action set out, but leaves the question of damages for the jury, or the court sitting in their place. *Bacon v. Charlton*, 7 Cush. 581; 1 Wait's L. & Pr. 1056. And see *Lloyd v. Walkey*, 9 Carr. & P. 771. On the other hand, if the complaint is general, as in an action of trover for several distinct articles, the answer will operate as an admission of some cause of action, though not of a conversion of any particular article set out in the complaint. *Cook v. Hartle*, 8 Carr. & P. 568; *Story v. Finnis*, 6 Exch. 123; 1 Wait's L. & Pr. 1056.

That the averments of a plea of tender must show that the sum tendered was sufficient to discharge the debt, see *Bailey v. Troxell*, 43 Ind. 432.

As it respects evidence of a tender, it is held that tenders are *stricti juris*, and nothing will be presumed in their favor. *Shotwell v. Dennman*, 1 N. J. Law, 174. And where a tender is pleaded the burden of proof is upon the party pleading it. *Pulsifer v. Shepard*, 36 Ill. 513. But proof of a tender, though not of that clear and satisfactory character which convinces the mind beyond doubt, will be held sufficient. *Kerney v. Gardner*, 27 id. 162.

Where a complaint avers a tender, and a tender is necessary to support the action, evidence that a tender has been waived, is admissible and is sufficient. *Holmes v. Holmes*, 9 N. Y. (5 Seld.) 525.

Where a party pleads a tender in equity, he will be held to as great strictness as he would be at law. *Taylor v. Reed*, 5 T. B. Monr. (Ky.) 36.

§ 18. **Tender of chattels.** Like a tender of money, a tender of chattels ought to be without qualifications or conditions, or it will be invalid ; and the tender should be made in such a way that the party may have a reasonable opportunity of inspecting the chattels, and of ascertaining whether what he has bargained for is presented for his acceptance. *Isherwood v. Whitmore*, 10 Mees. & W. 757 ; 11 id. 347 ; *Brown v. Gilmore*, 8 Me. 107. So, like a tender of money, a tender of chattels may be made by an agent ; but if the agent has instructions from his principal, not to deliver the chattels to the other party unless he will cancel and deliver up the contract, this is not a good tender, although the agent had the chattels at the right time and the proper place. *Robinson v. Batchelder*, 4 N. H. 40.

A tender of chattels differs, however, both in mode and effect, from a tender in money. Thus, we have seen (*ante*, p. 582, Art. 1, § 8), that, if the payment is to be made in money, it is the duty of the defendant, when the debt is due, to seek the plaintiff, in order to make the payment. See, also, *Goodwin v. Holbrook*, 4 Wend. 379. But if the payment is to be made in specific articles, such as grain, timber, produce, groceries or the like, then a *demand* may be necessary, for the reason that he who is to perform is not bound to carry the property about seeking the other party, but it is for the other to go and get it, or to appoint where he will receive it, that it may be delivered to him. Co. Litt. 210, *b*. And see *Bach v. Owen*, 5 Term R. 409 ; *Scott v. Crane*, 1 Conn. 255 ; *Lobdell v. Hopkins*, 5 Cow. 516 ; *Ewing v. French*, 1 Blackf. (Ind.) 170 ; *Mason v. Briggs*, 16 Mass. 453. The general rule is stated to be, that “where payment is to be made in any thing besides money, and it appears, or is necessarily implied from the terms of the contract and the nature of the articles to be received in payment, that it was the intention of the parties that the debtor is to deliver them at his residence, or otherwise, when requested by the creditor, then a special request to deliver them must be made to the debtor before suit is brought ; but in all other cases, no demand is necessary before suit for a debt.” DALY, C. J., in *Counsel v. Vulture Mining Company of Arizona*, 5 Daly (N. Y.), 74. See, also, *Miles v. Roberts*, 34 N. H. 253 ; *Middlesex Co. v. Osgood*, 4 Gray, 447 ; *Barr v. Myers*, 3 Watts & Serg. 299. Chattels require different modes of tender according to their character. See *id.* The subject-matter of the agreement, the object of making it, the sense in which the parties mutually understood it at the time it was made, the place where it was entered into, the use to which any articles stipulated to be delivered were to be applied, if materials for building, when and where to be used, and finally the practical exposition, and

the general understanding, custom and usage among those who enter into similar contracts, in the execution and performance, must all be taken into consideration. *Roberts v. Beatty*, 2 Penr. & W. (Penn.) 63; *Miles v. Roberts*, 34 N. H. 245. And see *Hayden v. Demets*, 53 N. Y. (8 Sick.) 426.

Where the time of delivery is fixed, the tender should be at the time agreed, unless the time fall on a Sunday, in which case a tender on Monday is sufficient. *Salter v. Burt*, 20 Wend. 205; *Barrett v. Allen*, 10 Ohio, 426; 2 Story on Cont., § 1411. A tender after sunset is sufficient, if the debtor was present and prepared to deliver the chattels at the appointed place in season to complete the tender before sunset, and the creditor was absent and could not receive them. *Avery v. Stewart*, 2 Conn. 69. And see *Startup v. Macdonald*, 7 Scott (N. R.), 269; *Southworth v. Smith*, 7 Cush. 391; *Duckham v. Smith*, 5 T. B. Monr. (Ky.) 372; *Berry v. Nall*, 54 Ala. 446; *Savary v. Goe*, 3 Wash. (C. C.) 140; *Haynes v. Thom*, 28 N. H. 400. A debt payable at a certain time in specific articles is payable in money after the expiration of that time, unless there has been a tender of the articles, at the time. *Townsend v. Wells*, 3 Day (Conn.), 327; *Hamilton v. Eller*, 11 Ired. (No. Car.) Law, 276. But under a contract to deliver chattels at a certain time and place, it is a good defense *pro tanto* that the creditor received and accepted a part of the articles before the day specified. *Robinson v. Batchelder*, 4 N. H. 40.

After a tender of specific articles it is not necessary, as in case of a tender of money, for the debtor to have the property always ready. A complete and effectual tender vests the title to the chattels in the creditor, but a tender of money does not. *McConnel v. Hall*, Brayt. (Vt.) 223; *Smith v. Loomis*, 7 Conn. 110; *Curtis v. Greenbanks*, 24 Vt. 536; *Leballister v. Nash*, 24 Me. 316; *Lamb v. Lathrop*, 13 Wend. 95. But see *Weld v. Hadley*, 1 N. H. 295. Upon a valid tender of a chattel, or the promissory note of a third party, in performance of a contract, the title is changed and the contract discharged; and if the tender is refused, the party making it may, if he so elect, continue in possession, and thereupon become a bailee for the creditor. *DesArts v. Leggett*, 16 N. Y. (2 Smith) 582. But in order that a tender may have the effect to vest the title to the chattels in the creditor, they must be separated, set apart, and designated, so that the creditor may distinguish them from all others. *Cherry v. Newby*, 11 Tex. 457; *Wyman v. Winslow*, 11 Me. 398; *Smith v. Loomis*, 7 Conn. 110, 119; *Bates v. Bates*, 1 Miss. (Walk.) 401; *McJilton v. Smizer*, 18 Mo. 111.

Where the promise is in the alternative, either to pay a specified sum,

or to deliver certain chattels, at a particular time, the right of election belongs to the promisor. And he may pay the money or deliver the chattels at his option, provided he makes his election and the payment or delivery before the day for performance has passed. *Stewart v. Donnelly*, 4 Yerg. (Tenn.) 177; *Gilman v. Moore*, 14 Vt. 457; *Plowman v. Riddle*, 7 Ala. 775. But, if that day is permitted to pass without any election by the promisor, this right of election is gone and the promisee has an absolute right to the money, and may maintain an action for its recovery. *Id.*; *Trowbridge v. Holcomb*, 4 Ohio St. 38; *Heywood v. Heywood*, 42 Me. 229; *Choice v. Moseley*, 1 Bailey (So. Car.), 136; *Miller v. McClain*, 10 Yerg. (Tenn.) 245.

Where a right of action has accrued, for the non-delivery of an article agreed to be delivered in a certain event, such right is not defeated by a subsequent tender. *Gould v. Banks*, 8 Wend. 563. See *Buck v. Burk*, 18 N. Y. (4 Smith) 337.

In a plea of tender of goods, upon a note, the articles tendered must be particularly described, so that they can be known. *Nichols v. Whiting*, 1 Root (Conn.), 443. So, a plea of tender of specific property at the obligor's residence should show that the tender was made at the uttermost convenient hour of the day. *Jouett v. Wagon*, 2 Bibb (Ky.), 269. See, also, *Tiernan v. Napier*, 5 Yerg. (Tenn.) 410.

§ 19. **Tender of performance.** In order to make a tender effectual, so as to give a vendee in a contract for the conveyance of real estate, a right to demand a deed, an offer to pay the money without condition, and a demand for a deed, with an offer to execute the mortgage agreed upon, should be shown. *Gaven v. Hagen*, 15 Cal. 208. See *Henry v. Raiman*, 25 Penn. St. 354. And where by special contract between the vendor and the vendee, a deed of the land placed in the hands of a third party is to be delivered to the vendee upon the payment by him to the vendor of the amount of a note given for the purchase-money, the vendor may collect that note by law without tendering a deed. *Rollins v. Thornburg*, 22 Iowa, 389.

A tender of a deed to one of two joint purchasers, and a refusal by him, is sufficient. No tender need be made to the other also. *Carman v. Pultz*, 21 N. Y. (7 Smith) 547; *Dawson v. Ewing*, 16 Serg. & R. 371.

But a tender, though sufficient to enable a party to maintain an action upon a dependent covenant, condition, or agreement, is not equivalent to performance. And when suit is brought, the plaintiff must show a continuous readiness to perform after the tender. *Redington v. Chase*, 34 Cal. 666.

A tender of performance of a contract for services, when once sufficiently made, need not be repeated unless the defendant has signified his willingness to accept it. *Thompson v. Wood*, 1 Hilt. (N. Y.) 93. And see *Howard v. Daly*, 61 N. Y. (16 Sick.) 362; 19 Am. Rep. 285.

Where a purchaser signs and delivers to the seller an agreement to buy personal property upon terms specified, and the latter agrees by parol to sell upon the terms stated, there is a binding contract which may be enforced against the purchaser. And the seller in such case may, upon tender of performance upon his part and demand of payment, and upon refusal of the purchaser to perform, treat the property as belonging to the defendant, and may sue for and recover the price agreed to be paid. *Mason v. Decker*, 72 N. Y. (27 Sick.) 595. Or he may elect to sell the property as the agent of the purchaser, apply the proceeds upon the purchase-price, and recover the balance, if any, or he may retain the property, and recover as damages the difference between the contract price and the market price. *Id.* And see *Dustan v. McAndrew*, 44 N. Y. (5 Hand) 72.

In an action upon a covenant to perform certain work, a plea of tender to perform the work, without showing where the tender was made, or without averring that the obligee was requested to appoint the place, was held to be bad. *Trabue v. Kay*, 4 Bibb (Ky.), 226.

CHAPTER LXV.

USURY.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition and nature. Usury is the excess over the legal rate charged to a borrower for the use of money. Originally, the word was applied to all interest reserved for the use of money, and in the early ages the taking of such interest was not allowed. 2 Bouv. Law Dict. 629.

To constitute usury there must be a contract for the return of the money at all events; for, if the return of the principal with interest, or the principal only, depends upon a contingency, there can be no usury; but if the contingency extends only to interest, and the principal be beyond the reach of hazard, the lender will be guilty of usury if he receives interest beyond the amount allowed by law. As the principal is put to hazard in insurances, annuities, and bottomry, the parties may charge and receive greater interest than is allowed by law in common cases, and the transaction will not be usurious. Ord on Usury, 23, 39, 64; *Bank of United States v. Owens*, 2 Pet. 537. And see *Tiffany v. Boatman's Institution*, 18 Wall. 375. But where a contract is simply for the loan of money, and the capital is to be returned at all events, any profit made or loss imposed upon the borrower in addition to the legal rate of interest is usury, no matter what form or disguise it may assume. *Buttrick v. Harris*, 1 Biss. 442. But nothing short of a corrupt and illegal contract in violation of the statute will constitute usury; it must be a contract or agreement for the loan or forbearance of money, goods, or things in action, by which illegal interest is reserved, or agreed to be reserved or taken, otherwise usury does not exist. *Lesley v. Johnson*, 41 Barb. 359; *Wright v. Elliott*, 1 Stew. (Ala.) 391; *Jordan v. Mitchell*, 25 Ark. 258.

It is the actual payment on a usurious contract, in part or in whole, which consummates the usury, from which the limitation of suit for the penalty begins to run. But lawful interest may be recovered in an action for the principal. *Brown v. Second Nat. Bank of Erie*, 72 Penn. St. 209.

Although the intent is essential to constitute the offense of usury, the intent must be deduced from, and determined by the facts. The knowingly and voluntarily taking or reserving a greater interest or compensation for a loan than that allowed by law is *per se* usurious. The offense is not condoned by want of intent to violate the statute or by giving to the transaction another name than that of a loan. *Fiedler v. Darrin*, 50 N. Y. (5 Sick.) 437; *Kelley v. Lewis*, 4 W. Va. 456; *Cooper v. Nock*, 27 Ill. 301; *Duwall v. Farmers' Bank*, 7 Gill & Johns. (Md.) 44; *McGill v. Ware*, 4 Scam. (Ill.) 21; *Rhodes v. Fullenwider*, 3 Ired. 415; *Childers v. Deane*, 4 Rand. (Va.) 406. But see *Doak v. Snapp's Ex'rs*, 1 Cold. (Tenn.) 180; *Fay v. Lovejoy*, 20 Wis. 407. When there is no usurious agreement, the question whether there was a usurious intent is immaterial. *Smith v. Paton*, 31 N. Y. (4 Tiff.) 66. But usury laws, being for the protection of the borrower, the lender may receive an excess over the legal interest, voluntarily paid by a third person. *McArthur v. Schenk*, 31 Wis. 673; 11 Am. Rep. 643.

The principle upon which usury is allowed as a defense is, that the parties are not *in pari delicto*, the borrower being under such moral duress as to take from him the character of *particeps criminis*. *Hewitt v. Dement*, 57 Ill. 500. But to constitute usury, both parties must be cognizant of the facts which make the contract usurious. *Powell v. Jones*, 44 Barb. 521; *Smith v. Beach*, 3 Day, 268. Thus, where more than lawful interest is reserved, with the knowledge of the lender, but without the knowledge of the borrower, the transaction is not usurious. *Id.* But if a greater rate than legal interest be reserved or taken by a party to a contract, upon a mistaken supposition of a legal right so to do, it is, nevertheless, a corrupt agreement within the statute. *Maine Bank v. Butts*, 9 Mass. 49. Otherwise, it seems, of a miscalculation, or mistake in drafting, where there is no intentional departure from the legal rate. *Id.*; *Bank of Utica v. Smalley*, 2 Cow. 770; *Gibson v. Stearns*, 3 N. H. 185; *Livingston v. Bird*, 1 Root, 303.

Usury is not now considered an "iniquity." The contract is illegal only to the extent of the forbidden excess of interest. *Farmers', etc., Bank v. Harrison*, 57 Mo. 503; *Bedle v. Wardell*, 25 N. J. Eq. 349.

Generally it is a question for the jury whether a transaction, fair on its face, was a mere cover for a usurious loan. *Vail v. Heustis*, 14 Ind. 607; *M'Kesson v. McDowell*, 4 Dev. & Batt. 120.

Forbearance, in the sense of the statute, in relation to usury, is the giving a further day for the return of a loan, when the time originally agreed upon is passed, and if the rate of interest agreed on for such

forbearance is over the legal rate, it is usurious. *Graeme v. Adams*, 23 Gratt. (Va.) 225; 14 Am. Rep. 130; *Jackson v. Kirby*, 37 Vt. 448.

A subsequent agreement to pay a usurious interest will not avoid a contract which was legal in its inception. *Chastain v. Johnson*, 2 Bailey (So. Car.), 574; *Foltz v. Mey*, 1 Bay (So. Car.), 486; *York Bank v. Asbury*, 1 Biss. 230; *Emmons v. Barnes*, 4 Daly (N. Y.), 418.

Every subsequent security given for a loan originally usurious, however remote or often renewed, is void. *Walker v. Bank of Washington*, 3 How. (U. S.) 62; *Sugart v. Mays*, 54 Ga. 554; *Price v. Lyons Bank*, 33 N. Y. (6 Tiff.) 55; *Campbell v. McHarg*, 9 Iowa, 354. If a promissory note be made on a usurious contract, it will be void, even in the hands of a *bona fide* holder for a valuable consideration. *Churchill v. Suter*, 4 Mass. 156; *Payne v. Trezevant*, 2 Bay, 23; *Powell v. Waters*, 8 Cow. 669; *Young v. Berkley*, 2 N. H. 410. And when new securities are taken for a usurious loan, it is immaterial that they are the obligations or mortgages of a stranger; he may avoid it for the original usury. *Vickery v. Dickson*, 35 Barb. 96; *Garth v. Cooper*, 12 Iowa, 364. But where parties, who have actually paid usurious interest, afterward make a *bona fide* settlement and take new securities, including only an actual loan, and not meant as a mere evasion, the new contract is neither usurious in itself, nor based upon an usurious consideration. *Smith v. Stoddard*, 10 Mich. 148.

Where a usurious security is taken for a valid debt, the avoidance of the security revives the debt, and the assignment of the usurious security carries with it the right to resort to and enforce the original debt. *Gerwig v. Sitterly*, 56 N. Y. (11 Sick.) 214; *Patterson v. Birdsall*, 64 N. Y. (19 Sick.) 294; 21 Am. Rep. 609.

And where, after the principal of a bond and mortgage has fallen due, a usurious agreement is made between the parties for an extension of time, and where, under a provision of the instrument declaring that in case of failure to pay the interest, within a certain time after it is due, the whole principal becomes due at the option of the holder, the latter, upon default in the payment of interest accruing after the extension, brings an action for foreclosure, claiming the whole amount secured to be due, the mortgagor cannot claim the benefit of the extension, and yet seek to defeat the foreclosure by asking that the usurious consideration paid therefor shall be applied in payment of the interest. *Church v. Maloy*, 70 N. Y. (25 Sick.) 63. And see *Richards v. Kountze*, 4 Neb. 201.

Although a contract of loan is void for usury, yet the moral obligation of the borrower to repay the amount loaned, and interest, may,

if no positive law forbids, be a good consideration for a new promise to make such payment. *Houser v. Planters' Bank of Fort Valley*, 57 Ga. 95.

§ 2. **What contracts are usurious.** Where a loan of money, in currency, is made, under an agreement that the borrower shall pay for the loan one-half of one per cent per month in currency, and seven per cent per annum in gold, gold being then at a premium of $39\frac{1}{2}$ per cent, as matter of law the contract is usurious. *Tyng v. Commercial Warehouse Co.*, 58 N. Y. (13 Sick.) 308. And see *Gates v. Hackethal*, 57 Ill. 534; 11 Am. Rep. 45. And where chattels are conveyed upon an agreement that the owner may repurchase the same within six months, upon paying the amount advanced, with two and one-half per cent per month for the use thereof, the contract is usurious upon its face. *Starkweather v. Prince*, 1 MacArthur, 144. So a contract whereby the purchaser of property is to pay his vendor ten per cent on the purchase-money until settlement in full, under the name of rent, is usurious upon its face. *Scofield v. McNaught*, 52 Ga. 69. And if an exchange is contracted for as a mere expedient for obtaining, for the use of money, more than legal interest, it is usury. *Cornell v. Barnes*, 26 Wis. 473. And when a lender knowingly contracts for an illegal rate of interest, the fact that the borrower is ignorant of the circumstances does not prevent the transaction from being deemed usurious. *Bank of Milwaukee v. Plankinton*, 27 Wis. 177; 9 Am. Rep. 473. But see authorities cited in § 1, *ante*, p. 603. An agreement in a mortgage and note to pay the attorney's fee, if there should have to be a foreclosure, is usurious, as not enforceable without allowing a greater recovery than the debt, with legal interest and cost. *Thomasson v. Townsend*, 10 Bush (Ky.), 114. See § 3, *post*, p. 607.

When usury is added to the principal debt for one year, and the contract provides for only the legal rate after maturity, it is but one contract for the reservation of usurious interest, and is vicious in all its parts, no matter in what mode the interest is expressed to be paid. *Wilday v. Morrison*, 66 Ill. 532.

When a lender stipulates for a contingent benefit beyond the legal rate of interest, and has the right to demand the repayment of the principal sum, with the legal interest thereon, in any event, the contract is in violation of the statute prohibiting usury and is void. *Browne v. Vredenburg*, 43 N. Y. (4 Hand) 195. And see § 1, *ante*, p. 603. Any stipulation for a chance of an advantage beyond lawful interest is usurious. *Thomas v. Murray*, 34 Barb. 157. So, an agreement to pay a lender a share of the profits, in addition to his principal and interest, is usurious. *Sweet v. Spence*, 35 Barb. 44. So is an agree-

ment that the lender may collect his money, with legal interest, upon a certain contingency, but that, if he does not collect it, it shall bear usurious interest from the outset. *Cooper v. Tappan*, 9 Wis. 361.

A note antedated for the purpose of entitling the payee to receive more than legal interest is usurious. *Williams v. Williams*, 3 Green (15 N. J. Law), 255. So is an agreement between the parties to postpone a sale under an execution, for a consideration of ten dollars beyond the legal interest. *Carter v. Brand*, C. & N. 28.

Where any part of a contract is tainted with usury, the whole contract is void. *Matthews v. Coe*, 56 Barb. 430; *Cullanan v. Shaw*, 24 Iowa, 441; *Willie v. Green*, 2 N. H. 333.

A loan nominally for \$5,000 at legal interest, whereof the borrower received \$4,500, and a draft for \$500, which was never paid, is usurious. *Hewitt v. Dement*, 57 Ill. 500. And see *East River Bank v. Hoyt*, 32 N. Y. (5 Tiff.) 119.

A contract to pay a certain sum of money for the extension of time on a note in addition to legal interest is usurious. *Ferrier v. Scott's Adm'rs* 17 Iowa, 578.

An agreement between the agent of the lender and the borrower, that the latter shall pay more than the legal rate of interest, renders the note given for the loan usurious and void, although such agreement was made without the knowledge or consent of the payee (the principal), and although the excess over lawful interest was received and appropriated by the agent. *Algur v. Gardner*, 54 N. Y. (9 Sick.) 360. But see *Estevez v. Purdy*, 66 N. Y. (21 Sick.) 446; *Stout v. Rider*, 12 Hun (N. Y.), 574. So an agreement to pay interest upon a note "at the rate of six per cent per annum, to be compounded annually," renders the contract usurious. *Cox v. Brookshire*, 76 No. Car. 314.

The defendant, by means of fraudulent misrepresentations made to him that a company was about being formed to purchase an interest in a valuable patent right, was induced to agree to take an interest in such company. He executed his promissory note for the amount he was to contribute as a member of the company, which he put into the hands of the payee, to show to others as evidence that he was willing to take a share. No company was formed; and the note was sold by the payee, before maturity, at a discount greater than lawful interest. In an action on the note it was held that it had no inception until the sale, and was usurious and void. *Eastman v. Shaw*, 65 N. Y. (20 Sick.) 522.

Upon applying for a loan of \$5,000, the borrower agreed to pay the lender \$400 as a compensation for his trouble and expenses in raising

the money, and for the sacrifice he would have to make in the sale of securities to raise the same. The trouble and expense consisted in a journey of about fifty miles in all to discount a note and to sell securities. It was held that the agreement to pay the \$400 as a compensation was not made in good faith, but was a mere device to avoid the usury laws, and that the mortgage given to secure the loan was void. *Van Tassell v. Wood*, 12 Hun (N. Y.), 388.

The plaintiff, being indebted to B. & Co., note brokers, placed in their hands his promissory notes to be sold at a discount of twelve per cent, and proceeds applied on his account. The defendant purchased the notes of B. & Co. at the discount stated, upon the representation by B. & Co. that they were first class business paper. In an action, among other things, to compel the cancellation of the notes as usurious, it was held that the notes had no inception until they were passed to the defendant, and therefore they were usurious; but that B. & Co. were the agents of the plaintiff in making the sales; that he was bound by their representations, and so was estopped from setting up usury. *Ahern v. Goodspeed*, 72 N. Y. (27 Sick.) 108. But an obligation, valid in its inception, is not invalidated by an usurious agreement for the extension of the time of payment; but the sum paid on the agreement for forbearance will, in equity, be applied as payment. *The Real Estate Trust Company v. Keech*, 69 N. Y. (24 Sick.) 248; 25 Am. Rep. 181; modifying S. C., 7 Hun, 253. And see tit. *Payment, ante*, p. 379.

From the instances above cited, the general rule may be deduced, that in order to render a contract void for usury, it is necessary that both of the parties to the agreement should agree, and intend that more than the lawful rate of interest should be paid by the one and received by the other. The object of the statute is to prevent any lender from receiving more than the legal rate of interest upon a mere loan of money. It requires at least two contracting parties to make a contract, and agreements in relation to usury are no exception to the rule. To constitute usury there must be an unlawful or corrupt intent confessed or proved. The party must intentionally take or reserve, directly or indirectly, as interest, or as a compensation for giving time of payment, more than the legal rate of interest. 1 Wait's L. & Pr. 562. And see *Woodruff v. Hurson*, 32 Barb. 557.

§ 3. **What contracts not usurious.** A taking more than the legal interest for any consideration other than the forbearance, unless it be merely colorable, and with intent to cover up usury, will not be usurious. *Woodruff v. Hurson*, 32 Barb. 557; *Fisher v. Anderson*, 25 Iowa, 28; *Parker v. Coburn*, 10 Allen, 82. Thus a provision in a

promissory note for the payment of a greater per cent per annum than legal interest after maturity, as liquidated damages for non-payment when due, if inserted for the purpose of securing prompt payment, does not render the contract usurious. *Downey v. Beach*, 78 Ill. 53; *Fisher v. Otis*, 3 Chand. 83; Wis. 78; *Jones v. Berryhill*, 25 Iowa, 289; *Gruell v. Smalley*, 1 Duvall (Ky.), 358. When the debtor, by the terms of his contract, can avoid the payment of a larger by paying a smaller sum at an earlier day, the contract is not usurious, but the difference between the two sums is a penalty. *Gaar v. Louisville B. Co.*, 11 Bush (Ky.), 180; 21 Am. Rep. 209; *Wilson v. Dean*, 10 Iowa, 432. But where a note is made due in a short time, and the circumstances are such as to induce the belief that it was only designed to evade the statute, it will be considered a mere device to cover up a usurious transaction. *Pike v. Crist*, 62 Ill. 461.

A note or bill for a specific sum with legal interest, and providing that the debtor shall pay an attorney's fee, if sued on is not usurious. *Gaar v. Louisville B. Co.*, 11 Bush (Ky.), 180; 21 Am. Rep. 209; *Smith v. Silvers*, 32 Ind. 321; *Daniels v. Silvers*, id. 322.

Where the rate of interest is fixed by law at so much per annum, a contract may lawfully be made for the payment of that rate, before the principal becomes due, at periods shorter than a year, even although the effect of this may be, by allowing the party to re-invest and so compound his interest, to get more than the rate fixed. *Meyer v. Muscatine*, 1 Wall. (U. S.) 384; *Monnett v. Sturges*, 25 Ohio St. 384; *Goodrich v. Reynolds*, 31 Ill. 490. And, indeed, to take out the whole interest in advance on discounting a note by a bank is not usurious. *National Bank v. Smoot*, 2 Mac Arthur, 371; *Newell v. Nat. Bank of Somerset*, 12 Bush (Ky.), 57; *State Bank v. Hunter*, 1 Dev. 100; *Bank of Utica v. Phillips*, 3 Wend. 408; *Stribbling v. Bank*, 5 Rand. 132; *Thornton v. Bank of Washington*, 3 Pet. 40. And it seems others than a bank may take interest in advance. *English v. Smock*, 34 Ind. 115; 7 Am. Rep. 215; *Goodrich v. Reynolds*, 31 Ill. 490; *Lyman v. Morse*, note, 1 Pick. 295; *Hawks v. Weaver*, 46 Barb. 164.

Where a party is solicited to make a loan, and to procure the means of so doing must spend time and incur trouble and expense in collecting the same from others, and does this at the request of the borrower, and upon his agreement to pay for such services and expenses, the transaction is not usurious. *Atlanta Mining, etc., Co. v. Gwyer*, 48 Ga. 11; *Churchman v. Martin*, 54 Ind. 380; *Eaton v. Alger*, 2 Abb. (N. Y.) App. Dec. 5; *Beadle v. Munson*, 30 Conn. 175.

The sale of a note by a person not the maker for a sum less than its

face is not necessarily a usurious transaction, nor is the burden thrown upon the purchaser of inquiring into the character of the note. *Mechanics' Bank v. Foster*, 44 Barb. 87; *Freeman v. Brittin*, 2 Harr. (17 N. J. Law) 191; *French v. Grindle*, 3 Shep. (Me.) 163; *Rapelye v. Anderson*, 4 Hill, 472; *Wycoff v. Longhead*, 2 Dall. 92. And where a party exchanged a judgment for notes, and received a bonus for the exchange, which exceeded the legal rate of interest, it was held that such contract was not usurious. *Smith v. Price*, 2 Heisk. (Tenn.) 293.

It is not usurious for the lender of money to take advantage of the difference of exchange between the place of the loan and the place of payment, where both places are within the State. *Eagle Bank v. Rigney*, 33 N. Y. (6 Tiff.) 613; *Burrows v. Cook*, 17 Iowa, 436; *Central Bank v. St. John*, 17 Wis. 157.

An agreement by a mortgagor to pay the taxes on a mortgage debt is not necessarily usurious. *Banks v. McClellan*, 24 Md. 62. And if a person who obtains discounts at a bank voluntarily allows a sum to remain on deposit with the expectation that this course will enable him to obtain discounts more readily, but without any agreement or understanding that he may not draw his money at any time, there is no usury in the practice. *Appleton Bank v. Fiske*, 8 Allen, 201.

Where the promise to pay a sum above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious. Nor will usurious intent be inferred from a paper which, while referring to payment of a sum above the legal interest, is "uncertain and so curious," that intentional bad device cannot be affirmed. *Spain v. Hamilton*, 1 Wall. (U. S.) 604; *Sumner v. People*, 29 N. Y. (2 Tiff.) 337.

Where a lender has received a security providing for the payment of the precise amount loaned by him, with lawful interest, the fact that his agent, without his authority, knowledge or participation, has extorted from the borrower a sum of money, upon the false pretense that a portion thereof was a bonus for his principal, does not taint the security with usury. *Estevez v. Purdy*, 66 N. Y. (21 Sick.) 446; reversing S. C., 6 Hun, 46. And see *Philo v. Butterfield*, 3 Neb. 256; *Muir v. Newark, etc., Inst.*, 1 Green (N. J. Eq.), 537. Authority to make a usurious loan will not be presumed where the agency is special, and limited to a single transaction. It may be presumed where the agency is general, and embraces the business of making, managing, and collecting the bonus of a moneyed man. But it is a presumption of fact and may be rebutted. *Rogers v. Buckingham*, 33 Conn. 81; *Muir*

v. *Newark, etc., Inst.*, 1 Green (N. J. Eq.), 537. And see *Bell v. Day*, 32 N. Y. (5 Tiff.) 165.

Where, in an action to foreclose a mortgage owned by a trust estate, it appeared that one of the trustees received a usurious *bonus*, the mortgage is not avoided thereby, unless it be shown that the same was received by the authority or with the knowledge of the other trustees. *Van Wyck v. Walters*, 16 Hun (N. Y.), 209.

If the contract in suit did not violate any law in force when it was made, the defense of usury is untenable; although laws since passed would, if applicable, render the contract invalid. *Newton v. Wilson*, 31 Ark. 484.

A contract to make up the amount of interest which, at the time of the execution of the contract, had accrued on a certain prior indebtedness, at the legal rate, to such an amount as would have accrued thereon at some higher rate, is not a contract to pay interest; and therefore it is not invalid under the statute, as stipulating for interest in excess of the legal rate. *Daniels v. Wilson*, 21 Minn. 530.

An agreement to lend coin to be refunded in kind or if in "greenbacks," then at the rate of \$1.50 in currency for \$1.00 in coin, is *prima facie* a legal and not a usurious contract. *Finley v. McCormick*, 6 Heisk. (Tenn.) 392.

When parties are desirous of entering into a contract for their mutual advantage, the fact that a part of the arrangement is a loan by one to the other at the legal rate of interest to enable him to perform his part, does not present a case of usury, though the loan would not have been made except as a part of the contract, or even though the contract would not have been made without the loan. The mere fact that the loan is the consideration for another contract is not, in all cases, conclusive evidence of usury. If provision is made for full compensation to the borrower for all he may do under the collateral contract, there is no usury. *Clarke v. Sheehan*, 47 N. Y. (2 Sick.) 188. So, it is not usury for a lender to require and accept from the borrower, for a part of the loan, an assignment of a mortgage of land in another State, such mortgage bearing interest at a higher rate than is allowed in the State of New Jersey. *Steele v. Andrews*, 4 Green (N. J. Eq.), 409.

A loan of money is not usurious *per se*, where in consideration of the loan the borrower agrees to assume the genuine debt of a third party. *Valentine v. Conner*, 40 N. Y. (1 Hand) 248. And there is no usury in an agreement of a borrower to pay a subsisting debt of his own in consideration of a new debt or a further loan, provided the promise is to pay only the amount due on the old debt, and the amount of the loan with lawful interest. *Marsh v. Howe*, 36 Barb. (N. Y.) 649. So,

where, on a loan of money, the borrower agreed to repay, at a certain time, the amount of the money loaned, with lawful interest, and further agreed, upon default made in such payment, to perfect and surrender to the lender certain shares of stock pledged as collateral security for the loan, the transaction was held not to be usurious. *Ramsey v. Morrison*, 39 N. J. Law, 591.

A builder contracted to build houses for a certain sum payable in annual installments, to bear interest at a rate higher than the legal rate; and it was held that if the interest was a part of the contract price of the houses, the contract was not usurious. *Graeme v. Adams*, 23 Gratt. 275; 14 Am. Rep. 130.

§ 4. **Effect of devices to cover usury.** It is entirely immaterial in what manner or form or what pretense usurious interest is taken; and the devices of usurers are countless. Courts, therefore, have perceived the necessity of disregarding the form and examining into the real nature of the transaction. If there be in fact a loan, no shift or device will protect it. *Scott v. Lloyd*, 9 Pet. 446; *Tate v. Wellings*, 3 T. R. 531; *Mansfield v. Ogle*, 24 Law J. (N. S.) Ch. 450; 31 Eng. Law & Eq. 357; *Douglass v. McChesney*, 2 Rand. 112; *Delano v. Rood*, 1 Gilm. 690; *Dowdall v. Lenox*, 2 Edw. Ch. 267; *Brown v. Waters*, 2 Md. Ch. Dec. 201; *Williams v. Williams*, 3 Green 15 (N. J. Law), 255; *Spalding v. Bank of Muskingum*, 12 Ohio, 544; *Nickerson v. Babcock*, 23 Ill. 561; *Monroe v. Foster*, 49 Ga. 514. And see cases cited *ante*, §§ 1 and 2, pp. 602, 605.

§ 5. **What amounts to a loan.** It is almost invariably a question for the jury to determine whether the particular transaction before them amounts to a loan. Some of the devices resorted to, to cover usury, are difficult to prevent or to detect; but in all cases, the only question for the jury is, has one party had the use of the money of the other, and has he paid him for it more than lawful interest in any way or manner. And in this determination the contract will not be held good, merely because, upon its face, and by its words, it is free from taint, if substantially it be usurious; nor if it be in words and form usurious, will it be held so, if in substance and fact it is entirely legal. *Beete v. Bidgood*, 7 B. & C. 453; *Andrews v. Pond*, 13 Pet. 76. And these questions are for the jury only, who must judge of the intention of the parties, which lies at the foundation of the inquiry from all the evidence and circumstances. *Doe d. Metcalfe v. Brown*, 1 Holt's N. P. 295; *Carstairs v. Stein*, 4 M. & S. 192; *Smith v. Brush*, 8 Johns. (N. Y.) 84; *Thomas v. Cathedral*, 5 Gil. & J. 23.

The devices which are employed for the purpose of evading the usury laws are so numerous that no attempt need be made to enumerate or

classify them. The books of reports abound with cases which show the perseverance and the ingenuity of those who have vainly attempted to evade or to disregard the settled law. The statute is plain, and no one need violate its provisions. But whenever any person attempts to take usurious premiums for the loan or forbearance of money, his conduct is liable to be examined by a jury, or by a court sitting in their place, and if upon the evidence given it is proved that a usurious premium has been taken or received, or has been agreed to be taken or received, either directly or indirectly, it is the province and duty of such jury or court to declare the facts as they truly are; and, upon such finding of facts, the court will adjudge, as matter of law, that the contract is void. 1 Wait's Law & Pr. 578, and cases cited; *Wetter v. Hardesty*, 16 Md. 11.

It might be stated generally that if the principal is actually secured and not *bona fide* put at hazard, it amounts to a loan, and the taking of more than lawful interest is usury. *Tyson v. Rickard*, 3 Har. & J. 109.

Where one to whom an application for a loan of money is made declines, but offers to and does nominally sell to the applicant, upon a credit, property at an exorbitant price, which he knows the latter does not want, and can only use as a substitute for, and as a means of raising the money, the transaction will be considered, not as a *bona fide* sale, but as a usurious loan. *Quackenbos v. Sayer*, 62 N. Y. (17 Sick.) 344. And where similar circumstances which were held to make the transaction a loan, see *Millers v. Coates*, 4 Thomp. & C. (N. Y.) 429; *Low v. Prichard*, 36 Vt. 183.

In the absence of any proof of design to disguise a loan of money at a usurious rate of interest, a contract to exchange a State bond of \$1,000 for a promissory note of \$1,000 at three months, to be indorsed by a certain party, the bond to be sold the same day by the maker of the note at ninety-three per cent in the market, was held not to be usurious. *England v. Moore*, 4 Houst. (Del.) 289. See, also, *Calley v. Erb*, id. 315.

The plaintiffs guaranteed the paper of the defendants, but advanced no money; for this they were to receive a commission of two and a half per cent for four months. The transaction was held to be a contract for compensation for trouble and risk in raising money for another, which was not *per se* usurious, and not a loan of money, goods or things within the meaning of the statute, and therefore usurious. *More v. Howland*, 1 Edm. (N. Y.) Sel. Cas. 371. The *bona fide* sale of one's credit by way of guaranty or indorsement, though for a compensation exceeding the lawful rate of interest, is not usurious if the transaction

be unconnected with a loan between the parties. *Ketchum v. Barber*, 4 Hill, 224; 7 id. 444.

The purchase by a party, with his own means and for his own benefit, of outstanding demands held by others, though made at the request of the debtor, and for the purpose of averting a forced sale of the debtor's property, does not constitute a loan of money to the latter, within the intent of the usury laws. *Crane v. Price*, 35 N. Y. (8 Tiff.) 494.

§ 6. **Loan of bills and notes.** Where two persons exchange with each other notes of equal amounts for the purpose of raising money by a sale of the notes, each note is a valid consideration for the other, and a sale of either, at a discount greater than the legal per cent, does not render it usurious in the hands of the purchaser. 1 Wait's Law & Pr. 568; *Cobb v. Titus*, 10 N. Y. (6 Seld.) 198; S. C., 13 Barb. 45. But where, on an application for the loan of money, the borrower, in lieu thereof, and in exchange for his own obligation, receives the negotiable obligations of the lender, for the amounts which the parties intend shall be, and which are, used by the borrower to raise the money, the transaction is a loan within the usury laws. And if, by the obligations exchanged, the amount ultimately to be paid by the borrower is greater than that to be paid by the lender, the transaction is usurious. See 1 Wait's Law & Pr. 568; *Schermerhorn v. Talman*, 14 N. Y. (4 Kern.) 93; *Dry Dock Bank v. American Life Ins. Co.*, 3 N. Y. (3 Comst.) 344. A borrower who gives his note may receive the obligation of the lender, payable on time, and of less actual value than the sum secured to the lender, provided it is given at the *bona fide* request of the borrower, and for his accommodation, and there is no intention to take usury. But it is not enough to repel the presumption of usury, that the proposition came from the borrower, instead of the lender. 1 Wait's Law & Pr. 568, 569; *Gillett v. Averill*, 5 Denio, 85.

A loan, at the full lawful rate of interest, made in bills which were at the time unbankable, and depreciated one per cent below par, but were current at par in ordinary transactions among individuals, and were not proved to have been originally received by the lender, nor to have been passed by the borrower, below par, is not necessarily usurious; but the question is one of intent, and must be submitted to the jury. *Robbins v. Dillaye*, 4 Abb. (N. Y.) App. Dec. 71.

A stipulation in a bill of exchange for the payment of attorney's fees for collecting the bill is not usurious; and in a suit on the bill, the drawers, acceptors and indorsers will be liable for reasonable attorney's fees. *First Nat. Bank v. Canatsey*, 34 Ind. 149.

A note with the words "credit the drawer," written across its face by the payee, and involving a usurious discount, was held, in a suit by

the bank thereon, to be void, although only the president of the bank knew of the usurious character of the transaction. *Newport Nat. Bank v. Tweed*, 4 Houst. (Del.) 225.

Upon a renewal of an existing loan by giving new notes payable at the same place as the former, no question of exchange can arise. Any exaction beyond interest in such a case is usury. *Price v. Lyons Bank*, 33 N. Y. (6 Tiff.) 55; *Loveland v. Ritter*, 50 Ill. 54; *Berlin v. Mapes*, 38 How. (N. Y.) Pr. 288; *Campbell v. Sloan*, 62 Penn. St. 481. But if the maker of the note sets up the defense of usury, the plaintiff may recover on the original note, if that be not infected by usury. *Farmers, etc., Bank v. Joslyn*, 37 N. Y. (10 Tiff.) 353; *Campbell v. Sloan*, 62 Penn. St. 481.

The plaintiff lent money to the defendant derived from the proceeds of a sale of stock; the latter agreeing to pay interest, and also any advance in the market value of the stock during the period of the loan. It was held that the consideration of a promissory note, given for the amount, including the advance in the market value, was not usurious. *Snow v. Nye*, 106 Mass. 413. And the fact that a note was made payable eighty days after date, with interest at twenty-four per cent per annum after maturity, does not import a design to evade the usury laws *Davis v. Rider*, 53 Ill. 416; *Conrad v. Gibbon*, 29 Iowa, 120. And see *Griffin v. Marine Co.*, 52 Ill. 130; *Gimmi v. Cullen*, 20 Gratt. (Va.) 439.

The purchase of an usurious note must be with knowledge of the facts, either actual or inferable from the facts of the case, to make the contract usurious. *Frazer v. Syfert*, 2 Heisk. (Tenn.) 340. In Tennessee, if the usury does not appear on its face, a usurious note is held to be valid to the extent of the principal and legal interest. If the note be void any security for the note is also void, but if partially valid to the same extent. *McFerrin v. White*, 6 Coldw. (Tenn.) 499. See, also, *Dickerman v. Day*, 31 Iowa, 444; 7 Am. Rep. 156.

Bills or notes promising to pay the highest legal interest, from a time anterior to their date, will not be presumed usurious, as they are often given subsequently to its transaction which constitutes their consideration. *Ewing v. Howard*, 7 Wall. (U. S.) 499; *Rutherford v. Smith*, 28 Texas, 322; *Andrews v. Hart*, 17 Wis. 297.

A usurious contract for the extension of time on a note does not taint the note with usury. *Mallett v. Stone*, 17 Iowa, 64; *Culph v. Phillips*, 17 Ind. 209. And see authorities cited in § 3, *ante*, p. 607.

§ 7. **Of accommodation paper.** An accommodation note is invalid in the hands of the person for whose accommodation it was made. And if it be sold or discounted by him for more than the legal interest,

the transaction is usurious. *Overton v. Hardin*, 6 Coldw. (Tenn.) 375; *Lawrence v. Griffen*, 30 Tex. 400; *Campbell v. Nichols*, 33 N. J. Law (4 Vr.), 81; *Munn v. Commission Co.*, 15 Johns. 44; *Keutgen v. Parks*, 2 Sandf. 60; *Catlin v. Gunter*, 11 N. Y. (1 Kern.) 368. In other words, if the bill or note was of no validity in the hands of the holder as against the other parties, and he procures it to be discounted at a higher premium than the legal rate of interest, it is void in its inception (*Cowell v. Waters*, 17 Johns. 176; S. C., 8 Cow. 670); because it can have no existence as a binding contract until it is delivered as such. The distinction is between the purchase of a note that has been made and delivered by the maker in the usual course of business as evidence of a subsisting indebtedness, and a note delivered for a loan upon it by way of discount. To make it salable by him, the note must be perfect and available to the holder, and the test is the right to maintain an action upon it, against the parties to it, assuming it to be then due. *Powell v. Waters*, 8 Cow. 669, 686.

If an accommodation note is disposed of by the payee for less than its face, the transaction is usurious, although the indorsee takes it without notice that it was an accommodation note. *Whitten v. Hayden*, 7 Allen (Mass.), 407. See *Tufts v. Shepherd*, 49 Me. 312. But a party to accommodation paper who sells it as business paper, at a usurious discount, is estopped from setting up usury as a defense. *Jackson v. Fassit*, 33 Barb. (N. Y.) 645; 1 Wait's Law & Pr. 574; *Burrall v. DeGroot*, 5 Duer, 379.

But a mere accommodation guarantor of the note, who neither made any representations in relation to the character of the paper, or the circumstances under which it was given, nor was cognizant of the representations made to the purchaser, or to any one else, will not be estopped from interposing the defense of usury in the same manner as though he were a simple indorser of the note. *Parshall v. Lamoreaux*, 37 Barb. 189; 1 Wait's Law & Pr. 575.

§ 8. **Bonds.** A *bona fide* sale by one person of the bond of another, made at any rate of discount, however exorbitant, is not illegal. *Donnington v. Meeker*, 3 Stockt. (N. J.) Ch. 362. A bond, note or security valid in its inception is not rendered invalid by its subsequent receipt of usurious interest. *Ware v. Thompson*, 2 Beasley (N. J.), 66. And see cases cited *ante*, pp. 603, 607, in §§ 1 and 3. But to establish the defense of usury to a bond it is enough to show that the bond was substituted for a note which was usurious. When this fact appeared the inference necessarily followed that the taint entered into the substituted security unless the contrary is shown. *Stanley v. Whitney*, 47 Barb. 586.

What amounts to usury in a bond and assignment thereof, and what presumptions will be entertained in favor of the validity of such instruments were determined in the following cases depending upon particular facts. *Brown v. Champlin*, 66 N. Y. (21 Sick.) 214; *Coble v. Shoffner*, 75 No. Car. 42.

§ 9. **Mortgages.** Usury is a good defense to an action of foreclosure of a mortgage where the evidence discloses that the mortgage was given in pursuance of a usurious transaction. *Walch v. Cook*, 65 Barb. 30; *Aldrich v. Wood*, 26 Wis. 168; *Andrew v. Poe*, 30 Md. 485. A usurious mortgage is void as against a judgment creditor of the mortgagor. *Carow v. Kelly*, 59 Barb. 239. A mortgage is void for usury when a former usurious mortgage constitutes the greater part of the consideration of it. *McCraney v. Alden*, 46 Barb. 272. An agreement by a borrower upon mortgage to allow the lender to retain part of the land mortgaged after being repaid principal and interest of the loan, if it is a part of the mortgage transaction, is usurious, and will not be enforced. *Gleason v. Burke*, 20 N. J. Eq. (5 C. E. Gr.) 300. But if such an agreement is independent of the loan and mortgage, and not a condition of the loan, and capable of being sustained without reference to them, either as a sale on consideration or as a gift, it may be enforced; and though the agreement was not in writing, effect will be given to it, by limiting the quantity of land to be reconveyed, in ordering redemptions. *Ib.*

A mortgage, free from usury in its inception, is not affected by a subsequent agreement to forbear suit in consideration of the payment of illegal interest. Interest paid in excess of the legal rate, under agreement for its payment, in consideration of forbearance to sue, will be credited on the amount due on the mortgage. *Terhune v. Taylor*, 27 N. J. Eq. 80; *Abrahams v. Claussen*, 52 How. (N. Y.) Pr. 241. Obligations and securities having an independent existence, and untainted by usury, are not affected by the statute, although the subject of a contract tainted with usury. A valid and subsisting debt is not destroyed because included in a security or made the subject of a prohibited contract. Although formally satisfied and discharged, and the security surrendered, it may be revived and enforced, in case the new security is avoided. *Patterson v. Birdsall*, 64 N. Y. (19 Sick.) 294; 21 Am. Rep. 609; *Smith v. Hollister*, 1 McCarter (N. J.), 153.

A usurious mortgage may, by the act of the parties to it, be so purged of the illegal taint, that it will stand as a legal security against the mortgagor and all persons subsequently acquiring an interest under him. Such purgation would not affect an existing second mortgage; but where the holder of a second mortgage forecloses it, making the first

mortgagee a party, and treating the first mortgage as valid, and, at the sale, the property is sold subject to the first mortgage, the purchaser thereat cannot set up the original usurious taint against the first mortgage. *Warwick v. Dawes*, 26 N. J. Eq. 548. But an agreement between the holder of a usurious mortgage and the mortgagor, that, in consideration of a reduction allowed in the settlement of certain debts due him from the mortgagor, the mortgage should be regarded as purged of usury, will not remove the taint so long as the mortgage remains in the same hands. *Warwick v. Marlatt*, 25 N. J. Eq. 188.

A mortgage given to a building and loan association by a holder of its stock is not usurious because it requires monthly payments of interest, besides fines and impositions, in accordance with the provisions of the constitution of the association. *Red Bank Mut. Build. & Loan Assoc. v. Patterson*, 27 N. J. Eq. 223. And see *City Build. & Loan Co. v. Fatty*, 1 Abb. (N. Y.) App. Dec. 347.

A mortgage given to secure the payment of a note tainted with usury is valid, as between the maker of the note and one who purchased it for value, and without notice that the consideration was usurious. *Coor v. Spicer*, 65 No. Car. 401.

The sale of mortgage securities at a premium cannot subject the party to an action to recover back the premium on the ground of usury; no matter whether such premium was computed in the contract of sale at a certain percentage in excess of the legal rate for the time past, or stated at a gross sum, or as compound interest. *Culver v. Bigelow*, 43 Vt. 249.

A stipulation in a mortgage for the payment of attorney's fees in addition to legal interest, in case the holder is compelled to sue, does not render the mortgage usurious. *Siegel v. Drumm*, 21 La. Ann. 8; *Weatherly v. Smith*, 30 Iowa, 131; 6 Am. Rep. 663.

Where a wife, in order to secure a loan made to her husband, executes a chattel mortgage upon her separate property, she cannot maintain an action to have the same canceled, on the ground that the loan was usurious, unless prior to the commencement thereof she has tendered to the lender the amount actually loaned, and so alleges in her complaint. *Alden v. Diossy*, 16 Hun (N. Y.), 311.

§ 10. **Contracts for sale of lands.** Usury may exist where there is no loan of money; or where a money debt is created and forborne; or where the original contract by which a debt is created is for the purchase and sale of land it may be usury for the vendor to demand and receive more than legal interest for the forbearance of such debt. *Newkirk v. Burson*, 21 Ind. 129. So a contract whereby the purchaser

of property was to pay his vendor ten per cent on the purchase-money until settlement in full, under the name of rent, was held to be usurious on its face. *Scotfield v. McNaught*, 52 Ga. 69. So, too, a deed of bargain and sale for land, made in trust to secure the payment of money borrowed upon an usurious agreement, is an "assurance for the payment of money," within the North Carolina statute against usury, and is absolutely void; and a sale by the trustee to one purchasing, even without notice of usury, will convey no title to the purchaser. *Shober v. Hauser*, 4 Dev. & Batt. 91. But a contract in writing for the sale of lands, for a consideration equal in amount to that fixed by a previous verbal agreement, usurious in its terms, was held not tainted with the usury; such verbal contract not being binding under the statute of frauds. *Newkirk v. Burson*, 28 Ind. 435.

To contract for more than lawful interest upon deferred payments for land sold is not necessarily usurious. *Cutler v. Wright*, 22 N. Y. (8 Smith) 472. And an offer to sell land at one price for cash, or at a much larger price on a long credit, has nothing usurious in it, as there is neither a loan nor a forbearance of a debt. *Hogg v. Ruffner*, 1 Black (U. S.), 115.

§ 11. **Contracts for sale of personal property.** A note made in the course of a real business transaction, for which the original party has given a valuable consideration, is regarded as property, and the owner may sell it for the most he can get; there is nothing usurious in such a transaction. But if the note was made for the purpose of being sold to raise money, or as an artifice to evade the usury laws, under the color of a sale and purchase of the paper, this will not avail, and the purchaser, under such circumstances, with knowledge of the facts, either actual or inferable from the facts of the case, will be held guilty of usury, if the discount shall have been greater than the legal rate of interest. *Wetmore v. Brien*, 3 Head (Tenn.), 723; *Elwell v. Chamberlain*, 4 Bosw. (N. Y.) 320; *Baily v. Smith*, 14 Ohio (N. S.), 396; *Byrne v. Grayson*, 15 La. Ann. 457.

A sale of a note or mortgage for less than its face, with a guaranty of payment in full, is not usurious. *Goldsmith v. Brown*, 35 Barb. 484.

A contract to pay a bushel and a half of corn within a year, in return for one bushel, is not within the statute of usury, owing to the uncertain and fluctuating character and value of the article. *Morrison v. McKinnon*, 12 Fla. 552.

Upon a sale of sheep on time, the buyer agreed to pay a certain sum, which was the value of the sheep at the time of the contract, at a future date. He also agreed to pay and deliver to the seller a certain number

of pounds of wool per head, annually. It was held not a usurious contract, although the value of the wool reserved exceeded the legal rate of interest allowed. *Gilmore v. Ferguson*, 28 Iowa, 220. And see *First Nat. Bank v. Owen*, 23 id. 185.

An exchange of securities, even though one party makes a profit by the transaction, is not usurious unless connected with a loan of money, and designed to cover such loan. It is absolutely essential, to constitute usury, that there be a loan or forbearance of money. *Perrine v. Hotchkiss*, 2 Lans. (N. Y.) 416. And the purchase of securities at any price upon which the parties may agree is not usurious. *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226. And where the transfer of a chose in action is coupled with a loan of money, though the security prove uncollectible, the transaction is not necessarily usurious. *Thomas v. Murray*, 32 N. Y. (5 Tiff.) 605. Where the lender of money on bond and mortgage takes from the borrower the necessary disbursements for searching the title to the premises mortgaged in good faith, and not as a cover, it is not usury, although the sum then taken amounts to more than lawful interest on the loan. *Eldridge v. Reed*, 2 Sweeney (N. Y.), 155. But see *S. C. reversed*, 50 N. Y. (5 Sick.) 685.

In all cases, then, where the contract is in form one of sale or exchange, if the court, in looking at the whole transaction, can see that the value secured to the vendor was in good faith but the price of the thing sold or exchanged, there can be no usury, whatever the price may be, or whatever the mode in which it may be secured. 1 Wait's Law & Pr. 569; *Dry Dock Bank v. American Life Ins. & Trust Co.*, 3 N. Y. (3 Comst.) 344; *Beete v. Bidgood*, 7 Barn. & Cress. 453. In a word, neither sales of credit nor loans, or sales of property, other than money, are touched by the statute. It is not enough that the vendee wants money and that this is known to the opposite party. Neither the necessities of the vendee, nor the use he contemplates making of his purchase, will deprive the vendor of his rights to determine for himself the terms upon which he will part with his property. His conduct may be oppressive; but all extortion is not usury. Nor can a penal statute designed to correct a particular evil be made a remedy for the violation of all duties of imperfect obligation. *Dry Dock Bank v. American Life Ins. & Trust Co.*, 3 N. Y. (3 Comst.) 359. But a contract for the sale of property by the borrower at a specified price to the lender, and a hiring of the same property by the borrower, at a rent or hiring which exceeds the lawful interest on such purchase-price, with a right of repurchase at a subsequent time by the borrower, is usurious, if the transaction is really a mere

loan of money. *Doe v. Gooch*, 3 Barn. & Ald. 664; *Doe v. Brown*, Holt's N. P. 295; 1 Wait's Law & Pr. 570; *Brooks v. Avery*, 4 N. Y. (4 Comst.) 225.

§ 12. **Contracts by or with corporations.** In New York illegality by reason of usury cannot be imputed to the contracts of corporations as borrowers. *Stevens v. Watson*, 4 Abb. (N. Y.) App. Dec. 302; S. C., 45 How. 104. Therefore one who has guaranteed the payment of bonds issued in this State, by a foreign corporation, for the payment of loans, in pursuance of a resolution of the directors, at a meeting held in this State, which bonds bear an interest of ten per cent, and are valid by the laws of the State where the corporation is located, cannot set up the defense of usury, when sued upon a bond as guarantor. *Smith v. Alvord*, 63 Barb. (N. Y.) 415. Nor can indorsers. See *Strong v. N. Y. Laundry Manuf. Co.*, 5 J. & Sp. (N. Y.) 279; *DeRoe v. Smith*, 4 Thomp. & C. (N. Y.) 690; *Freese v. Brownell*, 35 N. J. 285. But a corporation, in New York, is only prevented from avoiding its own contract on the ground of usury. Where the corporation succeeds to the rights of a party who might have availed himself of the defense of usury those provisions do not apply. Where, therefore, property is pledged to secure a usurious loan, a corporation which succeeds to the rights of the pledgor is not prohibited from demanding and recovering the property so pledged. *Merchants' Exchange Nat. Bank v. Commercial Warehouse Co.*, 49 N. Y. (4 Sick.) 635; S. C., 33 N. Y. Supr. Ct. 317.

The defendant, by its charter, was authorized to receive on deposit personal property, to make advances thereon or on pledge thereof, to collect and receive interest and commission at the customary and usual rates; also, to take the charge and custody of real and personal estate or *choses in action*, and to advance moneys thereon, on such terms and commissions and at such rate of interest (not exceeding seven per cent) as should be established by its directors. It was held that these provisions did not repeal the usury laws in the defendant's favor, nor give it any greater power to charge commissions than that possessed by an individual engaged in the same business, and that the question whether commissions charged professedly under the charter were in fact usurious was one of fact for a jury. *Tyng v. Commercial Warehouse Co.*, 58 N. Y. (13 Sick.) 308.

In the absence of any statutory provision to the contrary a bank purchasing a usurious note stands on the same footing as an individual. *Chafin v. Lincoln Savings Bank*, 7 Heisk. (Tenn.) 499. A loan of money to a corporation, on condition that the lender shall be employed in an official position where he is not needed, and paid a very large

salary, though the place is in fact a sinecure, is usurious. *Griffin v. New Jersey, etc., Co.*, 3 Stockt. (N. J.) 49.

A corporation conveyed lands to trustees, in trust to convey it in satisfaction of bonds of the company. It was held that the fact that the bonds bore a usurious rate of interest could not avoid the absolute deed of the trustees, given in consideration of the surrender of certain of the bonds. *Butler v. Myer*, 17 Ind. 77.

The contract of a member of a loan and building association, chartered by the superior court of Georgia, taking an advance according to the rules, is not usurious upon its face, whatever might be the premium at which he agreed to take the advance. *Parker v. Fulton Loan & Build. Assoc.*, 46 Ga. 166. And see *Jarrett v. Cope*, 68 Penn. St. 68; *White v. Mechanics' Build. Assoc.*, 22 Gratt. (Va.) 233.

§ 13. **Interest upon interest.** An agreement to pay interest on accrued interest is not invalid. *Quimby v. Cook*, 10 Allen (Mass.), 32; *Hale v. Hale*, 1 Coldw. (Tenn.) 233; *Stewart v. Petree*, 55 N. Y. (10 Sick.) 621; 14 Am. Rep. 352. Indeed, a contract to pay money at a subsequent period, with interest to be paid annually, and if the interest be not paid annually, then the interest to become principal, is neither usurious, unconscionable, nor contrary to public policy. *Scott v. Saffold*, 37 Ga. 384; *Parham v. Pulliam*, 5 Coldw. (Tenn.) 497; *Columbia County v. King*, 13 Fla. 451; *Dow v. Drew*, 3 N. H. 40; *Stewart v. Petree*, 55 N. H. 621; 14 Am. Rep. 352; *Mowry v. Bishop*, 5 Paige (N. Y.), 98; *Hill v. Meeker*, 23 Conn. 592. In cases where it is expressly stipulated that interest shall be payable at certain fixed times, it has been held that interest may be charged upon the interest, from the time it is payable. *Kennon v. Dickens*, 1 Taylor, 231; Cam. & N. 357; *Gibbs v. Chisolm*, 2 Nott & McC. 38; *Singleton v. Lewis*, 2 Hill (So. Car.), 408; *Doig v. Barkley*, 3 Rich. 125; *Peirce v. Rowe*, 1 N. H. 179. But it is held otherwise in *Ferry v. Ferry*, 2 Cush. 92; *Doe v. Warren*, 7 Greenl. (Me.) 48. See 1 Am. L. Cas. 341, 371.

Courts, we may safely say, do not generally declare contracts to pay interest upon interest usurious; and the extent to which they have gone is that of refusing to enforce a contract to pay interest thereafter to grow due, and they have done this not upon the ground of usury, but rather as a "rule of public policy" because such agreements "savor of usury" and "lead to oppression." See *Ossulston v. Yarmouth*, 2 Salk. 449; *Waring v. Cunliffe*, 1 Ves. Jr. 99; *Hastings v. Wiswall*, 8 Mass. 455; *Camp v. Bates*, 11 Conn. 487; *Childers v. Deane*, 4 Rand. 406; *Connecticut v. Jackson*, 1 Johns. Ch. 13. But it has been lately held in North Carolina that an agreement to pay interest upon a note

“at the rate of six per cent per annum to be compounded annually,” is usurious. *Cox v. Brookshire*, 76 No. Car. 314.

A settlement and payment of a debt, with compound interest, where there has been no previous contract to pay interest at stated periods or to pay interest in that mode, and there is no indulgence granted for the future, or other new consideration, is usurious. *Ward v. Brandon*, 1 Heisk. (Tenn.) 490.

§ 14. **Commissions, presents, etc.** A lender may charge in addition to the legal interest a reasonable sum for his trouble and services. *Fussel v. Daniel*, 10 Exch. 581; S. C., 29 Eng. L. & Eq. 369; *Kent v. Phelps*, 2 Day, 483; *Hutchinson v. Hosmer*, 2 Conn. 341; *Trotter v. Curtis*, 19 Johns. 160; *McKesson v. McDowell*, 4 Dev. & B. 120; *Rowland v. Bull*, 5 B. Monr. 146; *Brown v. Harrison*, 17 Ala. 774; *Parham v. Pulliam*, 5 Coldw. (Tenn.) 497; *Churchman v. Martin*, 54 Ind. 380. But the sum paid as a compensation or commission for service or trouble in any case should not exceed the amount usually taken in the course of trade in that business; and if it do, such excess will make the contract usurious. *Harris v. Boston*, 2 Camp. 348. If there be such charge it will be a question for the jury whether it is in fact a reasonable compensation for services rendered, or a mere pretense for obtaining usurious interest. *DeForest v. Strong*, 8 Conn. 519; *Bartlett v. Williams*, 1 Pick. 294; *Carstairs v. Stein*, 4 M. & S. 192. So an agreement by which a commission merchant is to receive full interest on advances, and also commissions, whether he makes sales or not, is not necessarily usurious; it may be intended as a cover for usury, but that intent is a question for the jury. *Cockle v. Flack*, 93 U. S. (3 Otto) 344. The usual commercial contract by which a commission merchant contracts with a dealer in produce or other merchantable commodity, for the loan or advance of his money at the legal rate of interest to enable the dealer to purchase or carry his merchandise, and also for an agreed commission to undertake the care, management and sale of the commodity may be made covers for usury; and when this fact is established by competent proof, they are within the condemnation of the laws against usury, and void. The question is, upon contracts for the transaction of a commission business in connection with the use of money, whether a fair, reasonable, usual and customary allowance for the trouble and inconvenience of transacting the business only has been secured, or whether, under the guise of a commission for services, trouble and expenses, the lender has sought to, and has reserved and secured to himself compensation for the use of his money in excess of the rate of interest allowed by law. The contracts are not necessarily usurious,

and the *onus* is upon the party seeking to impeach them for usury, to prove the guilty intent, and that the contract is a cover for usury, and for the loan of money upon usury. *Matthews v. Coe*, 70 N. Y. (25 Sick.) 239, 242.

A commission, in excess of lawful interest, exacted by an agent, for his own benefit, without the knowledge of his principal, does not necessarily make the loan usurious, even though the borrower believed the agent was dealing with him as a principal. *Lee v. Chadsey*, 3 Abb. (N. Y.) App. Dec. 43. And see *Estevez v. Purdy*, 66 N. Y. (21 Sick.) 446.

§ 15. **Law of place.** A person contracting for the payment of interest may contract to pay it, either at the rate of the "place of the contract," or at that of the "place of performance," as one or the other may be agreed on by himself and the creditor; and the fact that the rate of the place at which it is agreed that it shall be paid is higher than the rate in the other place, will not expose the transaction to the imputation of usury, unless the place agreed on was fixed for the purpose of obtaining the higher rate, and to evade the penalty of a usurious contract at the other place. *Miller v. Tiffany*, 1 Wall. (U. S.) 298; *Kilgore v. Dempsey*, 25 Ohio St. 413; 18 Am. Rep. 306; *Senter v. Bowman*, 5 Heisk. (Tenn.) 14; *Junction R. R. Co. v. Bank of Ashland*, 12 Wall. 226; *Duncan v. Helm*, 22 La. Ann. 418; *Houston v. Potts*, 64 No. Car. 33; *Kennedy v. Knight*, 21 Wis. 340. But where there is no agreement made regarding the rate of interest, the law of the place of contract governs, although the rate at the place of payment is lower, in the absence of any intent to evade the usury laws of the latter place. *National Bank v. Smoot*, 2 MacArthur, 371; *Mayor, etc., of Griffin v. Inman*, 57 Ga. 370; *Cloyes v. Hooker*, 6 Thomp. & C. (N. Y.) 448; S. C., 4 Hun, 231; *Merchants' Bank v. Griswold*, 72 N. Y. (27 Sick.) 472, 478. But where a promissory note, signed and dated in one State, and payable at a bank there, is negotiated for the first time in another State, the laws of the State where the note is negotiated are to control as to the defense of usury. *Dickinson v. Edwards*, 53 How. (N. Y.) Pr. 40; *National Bank v. Smoot*, 2 MacArthur, 371; *Providence Co. Savings Bank v. Frost*, 8 Benedict, 293; S. C. affirmed, 14 Blatchf. 233. But where the maker and indorser of a note reside in New York, where it is payable, the note is not usurious because discounted in New Jersey, for more than the legal rate of interest in New Jersey. The statute of New Jersey limiting the rate of interest to six per cent does not apply. *Hackettstown Bank v. Rea*, 6 Lans. (N. Y.) 455; S. C., 64 Barb. 175; S. C. affirmed, 53 N. Y. (8 Sick.) 618. Questions of usury are determined, where changes in the law have

taken place, by the law in force at the time when a remedy is sought upon the contract. A statute in general terms changing the rate of interest, or penalty for usury, applies to suits afterward brought, although they are founded upon contracts previously made. *Perrin v. Lyman*, 32 Ind. 16; *Matthias v. Cook*, 31 Ill. 83; *Simonton v. Vail*, 11 Wis. 90. A bond for the payment of money, which is void for usury, is not revived and validated by the repeal of the statute against usury. *Pond v. Horne*, 65 No. Car. 84.

A statute of New Brunswick, where the contract in controversy was made, provided in substance, that the reception of extra interest for the forbearance of payment of money, after it became due, would make the contract itself for the loan of the money void. And it was held that such provision, not entering into the contract at the time it was made, and being in the nature of a forfeiture, was to be interpreted by our courts according to the *lex fori*, and not according to the *lex loci contractus*. It was also held that, in an action on the contract, the defendant should not be allowed, by way of recoupment, for the extra interest paid although such extra interest was, by the foreign statute, recoverable by action. *Lindsay v. Hill*, 66 Me. 212; 22 Am. Rep. 564. And see *Murphy v. Collins*, 121 Mass. 6.

An enactment allowing recoupment of usurious interest relates to the remedy; and the right of recoupment is governed by the law in force at the time of suing, even though the question of usury in the debt may depend upon another law in force when the contract was made. *Bowen v. Phillips*, 55 Ind. 226; *Story v. Kimbrough*, 33 Ga. 21.

In the case of a note payable in one State, an agreement subsequent to its maturity, made in another, where the maker had his domicile, to pay the rate of interest allowed by the latter State, is not usurious, although that rate happens to be greater than is allowed in the State where it was originally payable, unless such agreement was intended as a cover for usury. *Townsend v. Riley*, 46 N. H. 300. So, too, a mortgage on real estate in Michigan, executed to secure a note payable in New York, with ten per cent interest, is valid under the laws of Michigan. The contract is not a New York contract, and is not rendered usurious and void by the statute of that State, prohibiting the taking of more than seven per cent interest. The securities bearing ten per cent interest, a legal rate in Michigan, the court cannot presume, against the fact, that usury under the New York statutes was intended. *Fitch v. Remer*, 1 Biss. 337.

§ 16. **Who may plead the defense.** The privilege of pleading usury is a personal one of the individual who has contracted to pay it.

Cramer v. Lepper, 26 Ohio St. 59; 20 Am. Rep. 756; *Studabaker v. Marquardt*, 55 Ind. 341; *Pritchett v. Mitchell*, 17 Kans. 355; 22 Am. Rep. 287; *Carmichael v. Bodfish*, 32 Iowa, 418; *Mordecai v. Stewart*, 37 Ga. 364; *Williams v. Tilt*, 36 N. Y. (9 Tiff.) 319; *Loomis v. Eaton*, 32 Conn. 550; *Ransom v. Hays*, 39 Mo. 445; *Cain v. Gimon*, 36 Ala. 168; *McArthur v. Schenck*, 31 Wis. 673; 11 Am. Rep. 643; *Austin v. Chittenden*, 33 Vt. 553; *Reed v. Eastman*, 50 id. 67.

All privies to the borrower, whether in blood, representation or estate, may, both in law and equity, by the appropriate legal and equitable defenses, attack or defend against a contract or security given by the borrower, which is tainted with usury, on the ground of such usury, where such contract or security affects the estate derived by them from the borrower. *Merchants' Ex. N. Bank v. Com. W'house Co.*, 49 N. Y. (4 Sick.) 636, 643, note; Ord on Usury, p. 131; *Lehman v. Marshall*, 47 Ala. 362; *Stein v. Indianapolis, etc., Ass.*, 18 Ind. 237. A surety may set up the defense. *Stockton v. Coleman*, 39 Ind. 106. But see *contra*, *Lamoille Co. Nat. Bank v. Bingham*, 50 Vt. 105; *Freese v. Brownell*, 35 N. J. 285; 10 Am. Rep. 239. So may a guarantor. *Huntrees v. Patten*, 20 Me. 28.

A guarantee or assignee of a borrower who does not take his grant or assignment subject to a lien on the property granted or assigned, created by the borrower, which is tainted with usury, is privy in estate with the borrower, as to the entire interests in the property described in the assignment or grant, as deriving from such borrower such entire interests, and, as such privy, may attack or defend against such lien. *Merchants' Ex. Bank v. Com. W'house Co.*, 49 N. Y. (4 Sick.) 643, note.

But if a grantee or assignee takes his assignment or grant from the borrower, subject to a lien on the property tainted with usury, then, as to so much of the property which is necessary to satisfy such lien, he is not in privity in estate with the borrower, for so much of the property is not assigned or granted to him; and therefore he does not, as to such lien, stand as a privy to the borrower. *Id.*; *Bullard v. Raynor*, 30 N. Y. (3 Tiff.) 206; *De Wolf v. Johnson*, 10 Wheat. 369. So the purchaser of a mere equity of redemption, in premises covered by a usurious mortgage, who buys subject to the lien of such mortgage, cannot set up usury as a defense to the incumbrance. *Conover v. Hobart*, 24 N. J. Eq. 120; *Huston v. Stringham*, 21 Iowa, 36; *Green v. Kemp*, 13 Mass. 515. So the defense is not available to one who has purchased the land, assuming the mortgage. *Cramer v. Lepper*, 26 Ohio St. 59; 20 Am. Rep. 756. The purchaser of real estate,

with covenants of warranty and against incumbrances, in an action against him to foreclose a mortgage thereon, given by his grantor to secure a promissory note, cannot avail himself, as matter of defense, of the fact that the debt for which such note was given was usurious. *Studabaker v. Marquardt*, 55 Ind. 341. A second mortgagee cannot plead usury in a prior mortgage, either to defeat it or to postpone its lien. *Pritchett v. Mitchell*, 17 Kans. 355; 22 Am. Rep. 287. But this would seem to be contrary to the general rule. *Cole v. Bansemer*, 26 Ind. 94; *Mutual, etc., Ins. Co. v. Bowen*, 47 Barb. 618; *Adams v. Robertson*, 37 Ill. 45; *Carow v. Kelly*, 59 Barb. 239; *Dix v. Van Wyck*, 2 Hill (N. Y.), 522.

An accommodation maker of a promissory note cannot avail himself, in a suit upon the note, of a payment of usury thereon by the party accommodated. *Cady v. Goodnow*, 49 Vt. 400; *Smith v. Exchange Bank*, 26 Ohio St. 141. And the accommodation indorser of a note, made by a corporation for the purpose of raising money, which note is discounted at a usurious rate of interest, cannot interpose the usury as a defense in an action brought against him on the note. *Stewart v. Bramhall*, 11 Hun (N. Y.), 139. See *Allerton v. Belden*, 49 N. Y. (4 Sick.) 373.

One who does not claim through or under the borrower does not stand in privity with the borrower. *Ohio, etc., R. R. Co. v. Kasson*, 37 N. Y. (10 Tiff.) 218.

A usurer cannot take advantage of his own usury to avoid a contract he has entered into. *Billington v. Wagoner*, 33 N. Y. (6 Tiff.) 31; *Miller v. Kerr*, 1 Bailey (S. C.), 4; *Bank of Gloversville v. Place*, 15 Hun (N. Y.), 564. And the maker of a usurious note is estopped from setting up the defense of usury thereto, against one to whom he has assigned it, representing that "it was all right and no usury in it," unless the assignee did not believe the representations. *Callanan v. Shaw*, 24 Iowa, 441. So, he would be bound by the representations of his agent. *Sage v. McLaughlin*, 34 Wis. 550.

A borrower may himself pay a usurious debt; and if he do, neither himself nor any other person can attack such payment on the ground of the usurious character. He may also, therefore, appropriate property for its payment, and make such appropriation by assigning the property in trust for the payment of the usurious debt; and if he do, neither the assignee nor any other person can (unless he attack the assignment for fraud) claim that property so appropriated shall not be applied to the payment of the usurious debt. The bare fact that such an assignment provides for the payment of a usurious debt will not of itself alone render the assignment usurious and void. *Green, Ex'r, etc.,*

v. *Morse*, 4 Barb. 332; *Murray v. Judson*, 9 N. Y. (5 Seld.) 73; *Fielder v. Varner*, 45 Ala. 429.

The defense of usury cannot be set up against the *bona fide* holder of a negotiable check, although it be invalid between the maker and the payee on that account. *Smalley v. Doughty*, 6 Bosw. (N. Y.) 66. So, usury in the consideration of a promissory note is no defense to the maker, in an action against him by a *bona fide* holder. *Young v. Berkley*, 2 N. H. 410; *Hackley v. Sprague*, 10 Wend. 113; *King v. Johnson*, 3 McCord, 365. But see *Churchill v. Suter*, 4 Mass. 156, 161; *Payne v. Trezevant*, 2 Bay, 23.

Where a usurious transaction has not been settled and the lender brings an action for the recovery of an alleged balance, the borrower may defend by claiming a credit for whatever usurious interest he has paid in the transaction. *Reinback v. Crabtree*, 77 Ill. 182.

Where a party gives his promissory note for money borrowed, payable in one year, with ten per cent interest, and with thirty per cent per annum interest after maturity, if not paid when due, as liquidated damages, a court of equity will not relieve him from the penalty, where the payee has practiced no deception and does no act to mislead him and induce him to make the note. His ignorance that the note contained such a provision, when he was able to read the same, affords no ground for equitable relief. *Downey v. Beach*, 78 Ill. 53.

Where notes are exchanged in such a way that the maker of one of the notes receives usury, he cannot set this up as a defense to an action on the note made by him. *Taylor v. Jackson*, 5 Daly (N. Y.), 497.

In an action to foreclose a mortgage upon a homestead estate, executed by the husband and wife, to secure a note made by the husband, it is competent for the wife to set up the defense of usury against the note. *Lyon v. Welsh*, 20 Iowa, 578.

Where a person, in consideration of a loan, executes a negotiable promissory note with interest for a sum greater than the amount of the loan, promising to give a mortgage to any holder of the note, and the payee indorses the note to a third party, upon the execution of a mortgage by the maker to the latter, such execution does not estop the maker from setting up the defense of usury in an action on the note. *Musselman v. McElhenny*, 23 Ind. 4. And see *Johnson v. Thompson*, 28 Ill. 352.

Usury can be set up as the foundation of a *jus tertii*, where the third party has settled with the plaintiff, and abandoned all further claims. *Betteley v. Reed*, 4 Q. B. 511; S. C., 3 G. & D. 561.

A mortgage given to secure the payment of a note tainted with usury is valid, as between the maker of the note and one who purchased it for

value, and without notice that the consideration was usurious. *Coor v. Spicer*, 65 No. Car. 401.

A purchaser, by agreement with his vendor, executed a bond and mortgage to secure a portion of the purchase-money, equal in amount to a prior usurious mortgage upon the same premises, and placed them in the hands of a third person, to be delivered to the vendor, if the latter should succeed in setting aside such prior mortgage, but if he failed in doing so, then to be disposed of to pay off such usurious mortgage, their proceeds to be delivered to the purchaser for that purpose. And this was held not to be such an assumption of the usurious mortgage, or purchase subject thereto, as would estop the purchaser from himself setting up the usury. *Berdan v. Sedgwick*, 44 N. Y. (5 Hand) 626.

An assignment of a lease, absolute upon its face, but in fact given as security for a usurious loan, may, in the hands of a purchaser of such lease from the usurious assignee, with notice that the original assignment was security for a loan, although without notice of its usurious character, be avoided for usury, by a judgment creditor of the original lessee. *Mason v. Lord*, 40 N. Y. (1 Hand) 476.

Where an administrator gives his promissory note for a sum due from his intestate, including certain unlawful interest which his intestate had agreed to pay, he cannot sustain a plea of usury in an action on the note. *Little v. White*, 8 N. H. 276. And where the original usurious contract has been changed by a new contract founded on it, in which an innocent person is a party, the defense of usury cannot be set up against such innocent person. *Jackson v. Henry*, 10 Johns. (N. Y.) 185.

The equitable owner of land, upon which a usurious mortgage has been given, is a "borrower" within the meaning of the statute relating to usury, and is therefore entitled to interpose that defense. *Equitable Life Ins. Soc. v. Cuyler*, 12 Hun (N. Y.), 248.

§ 17. **How pleaded.** Usury is a defense which cannot be made on the trial of a cause, unless it be pleaded. *Monford v. Davis*, 28 N. Y. (1 Tiff.) 481; *Newell v. Nixon*, 4 Wall. (U. S.) 572; *Bush v. Bush*, 7 Monr. 53; *Murry v. Crocker*, 1 Scam. (Ill.) 212. The plea of usury at the common law, and the answer setting up that defense under the New York Code, must set forth the usurious agreement, the names of the parties between whom it was made, the amount loaned, the amount of usury agreed to be paid, the length of time for which the loan was agreed to be made, and that the agreement was corrupt. *Nat. Bank of Auburn v. Lewis*, 10 Hun (N. Y.), 468; *Siesel v. Harris*, 48 Ga. 652; *Cowperthwaite v. Dummer*, 3 Harr. (18 N. J. Law) 258; *Clark v. Moses*, Kirby, 143; *Mullanphy v. Phillipson*, 1 Mo. 620; *M'Far*

land v. State Bank, 4 Pike (Ark.), 44; *Moody v. Hawkins*, 25 Ark. 191. The same facts should be shown in an answer in equity. *Crane v. Homœopathic Mut. Life Ins. Co.*, 27 N. J. Eq. 484; *Stark v. Sperry*, 2 Tenn. Ch. 304; *Hannas v. Hawk*, 24 N. J. Eq. 124. An averment that the complainant loaned the defendant \$2,000, and "exacted and extorted" a bond and mortgage for \$2,195, cannot avail as a defense of usury. It precludes the idea of consent, and there can be no usury without a contract. *Westerfield v. Bried*, 26 N. J. Eq. 357. But usury, though not directly pleaded, may be set up, by allegations showing that an unlawful rate of interest was agreed upon. *Kurz v. Holbrook*, 13 Iowa, 562. And in pleading usury for the purpose of avoiding a deed, it is unnecessary to set it out with all the particularity required in pleas of usury to actions for money. In such actions, amounts are material, but, in attacking a deed, the bare fact of usury is enough to decide the issue of title. *Carswell v. Hartridge*, 55 Ga. 412.

A plea to an action of ejectment which attacks a conveyance from the defendant to the plaintiff, as being part of a usurious contract, is not an equitable, but a strictly legal defense, and, to make it available, no tender or offer to pay the debt which the conveyance was intended to secure is requisite, even though the deed may amount, in equity, to a mortgage. *Sugart v. Mays*, 54 Ga. 554.

Where usury is a defense only for the illegal excess, a plea of usury which professes to answer the whole cause of action is demurrable. It should be limited to such part as the defendant is entitled to avoid, so that the plaintiff may take judgment *nil dicit* for all not denied. *Tittle v. Bonner*, 53 Miss. 578; *Tappan v. Prescott*, 9 N. H. 531; *Reed v. Moore*, 1 Meigs, 80.

The question of usury cannot be raised on demurrer to a bill setting out a contract, not usurious on its face. *Brakeley v. Tuttle*, 3 W. Va. 86.

The repeal of a usury law precludes afterward setting up the defense of usury in an action then pending. *Nichols v. Gee*, 30 Ark. 136. But it is held otherwise in Texas. *Smith v. Glanton*, 39 Texas, 365; 19 Am. Rep. 31.

If an answer in a suit in one State, pleading usury under the laws of another State, does not aver what are the laws of such State, but merely alleges that the security in suit is usurious, and contrary to the law of such State, the courts will presume that such foreign laws are the same as the laws of their own State. *Leake v. Bergen*, 27 N. J. Eq. 360. The defendant should file such a plea as the law of the foreign State prescribes. *Bowman v. Miller*,

25 Gratt. (Va.) 331; 18 Am. Rep. 686. See *Merchants' Bank v. Griswold*, 72 N. Y. (27 Sick.) 472.

If there are several defendants and all answer to the action and intend to avail themselves of a plea of usury, all should regularly join in the plea, although it may, perhaps, be verified by the oath of one alone. But, if one is defaulted, another may plead usury, and the party who is defaulted may have the benefit of the defense. *Tappan v. Prescott*, 9 N. H. 531.

In an action by the indorsee of a promissory note against the maker, a plea intended as a plea of usury should aver that the note was payable to the original payee only colorably, and to evade the usury law, and that the transaction was, in fact, a direct loan of money from the indorsee to the maker of the note. An averment that the indorsee "unlawfully, corruptly and usuriously" contracted with the maker amounts to nothing, unless facts are alleged showing wherein the usury consists. *Durham v. Tucker*, 40 Ill. 519.

§ 18. **Recovery back of usurious payments.** The right to recover back money paid for a loan in excess of legal interest, where that right is allowed, is not limited to the borrower. The injury done by the usurer is an injury to the estate of the borrower, and the right to recover back the amount of interest in excess of the legal rate passes to the assignee in bankruptcy. *Wheelock v. Lee*, 64 N. Y. (19 Sick.) 242. And to a receiver appointed in proceedings supplementary to execution. *Palen v. Johnson*, 46 Barb. 21. An assignee who stands in legal privity with the mortgagor may avoid the contract for the excess of usury, and is entitled to the proper reduction on the mortgage. *Banks v. McClellan*, 24 Md. 62. And we may safely assert that any one, who, by reason of privity with the borrower, could attack or defend against a contract on the ground of usury, may, where the right is permitted, maintain an action to recover back the excess over legal interest, actually paid.

If a party voluntarily pays a note and usurious interest, he cannot maintain an action to recover it back. *Tompkins v. Hill*, 28 Ill. 519. And a mortgagor cannot maintain an action to recover usurious interest, collected by the sale of his property, under a power of sale in the mortgage. That the payment was involuntary will not help the mortgagor. *Perkins v. Conant*, 29 Ill. 184.

The recovery back of the excess of the interest over that allowed by law seems to be allowed by way of penalty for a violation of the usury laws.

Usury may be recovered back although it was paid pending a suit

brought to recover it from the borrower. *Wheatley v. Waldo*, 36 Vt. 237.

A borrower cannot, by a contemporaneous agreement, waive the right to retain or recover back usurious interest. *Bosler v. Rheem*, 72 Penn. St. 54. And a claim for money taken as usury, while a law forbidding usury was in force, is not destroyed by the repeal of the law. *Whitaker v. Pope*, 2 Woods, 463.

Where a party contracts for and receives a greater rate of interest than is allowed by statute, he cannot recover any interest whatever on the principal, and all payments made of such interest may be allowed as payments of the principal, in a suit to recover the balance due. *Reinback v. Crabtree*, 77 Ill. 182.

The penalty recoverable from a national bank, under the act of congress, where a greater rate of interest than is allowed by law has been actually paid to and received by it, is twice the amount of the interest paid in excess of the legal rate, not twice the amount of the entire interest. The forfeiture of the entire interest attaches only in actions brought to enforce the usurious contract. *Hintermister v. First Nat. Bank*, 64 N. Y. (19 Sick.) 212. In assumpsit against a national bank to recover money paid as usury, it was held, on motion to dismiss, that the State courts have jurisdiction. *Dow v. Irasburgh Nat. Bank*, 50 Vt. 112.

The right to recover for the illegal interest, given by an act of congress, must be subject to the terms prescribed by that act, as to the time within which the right must be asserted. *Eastwood v. Kennedy*, 44 Md. 563.

The Pennsylvania usury law of 1858 (unlike that of New York) applies only to the parties to the transaction; it being at the election of the borrower whether he will withhold the excess, or recover it back within the time limited. *Miners' Trust Company Bank v. Roseberry*, 81 Penn. St. 309.

Where there has been a series of renewal notes given for the continuation of the same original loan or advance, the taint of usury in the first transaction follows down the descent through the whole line; and when, therefore, the bank sues to recover its debt on the last of the series of renewal notes, the borrower is entitled to credit for all the interest he has paid from the beginning on the loan, and not merely to the excess above the lawful rate. *Overholt v. Nat. Bank of Mt. Pleasant*, 82 Penn. St. 490.

A petition to recover usurious interest paid to an indorsee must aver that the holder was a *bona fide* indorsee, and that the note was purchased for value. It is not enough to aver that the note was indorsed

before due and without notice of the usury. *Dunn v. Moore*, 26 Ohio St. 641.

The defense of usury may be interposed in an action upon a note made before the adoption of the present constitution of Texas. And while any part of the usurious debt remains unpaid, the statute of limitations will not cut off the right of the party who has paid usurious interest thereon to recover it back. *Smith v. Glanton*, 39 Tex. 365; 19 Am. Rep. 31.

In Maryland, a borrower may recover back, in an action for money had and received, the usurious interest he has paid. *Scott v. Leary*, 34 Md. 389.

It is held in New York, that, where a wife, in order to secure a loan made to her husband, executes a chattel mortgage upon her separate property, she cannot maintain an action to have the same canceled, on the ground that the loan was usurious, unless prior to the commencement thereof she has tendered to the lender the amount actually loaned, and so alleges in her complaint. *Alden v. Diossy*, 16 Hun (N. Y.), 311.

§ 19. **When not recoverable.** In Minnesota, no action lies to recover back usurious interest which has been voluntarily paid. *Woolfolk v. Bird*, 22 Minn. 341. Nor in Iowa. *Quinn v. Boynton*, 40 Iowa, 304. Nor in Illinois. *Hadden v. Innes*, 24 Ill. 381. Usurious interest, included in the amount of a judgment confessed, cannot be recovered back after the judgment has been paid in full. *Hopkins v. West*, 83 Penn. St. 109. The payment of interest by a borrower to obtain a reconveyance of land held by the lender as security for the loan, and which the latter refused to reconvey without the payment, is voluntary, and cannot be recovered back because usurious. *Williamson v. Cole*, 26 Ohio St. 207.

Where the debt and usurious interest have been paid, and an action brought under the act of congress for the penalty, and an assignment has been made of the suit, neither the assignor nor his creditors have any right to set off the usurious interest so paid against judgments obtained by a bank against the assignor, when the usurious interest complained of was not on the judgments in controversy, but on other and antecedent notes. *American Sewing Machine Co.'s Appeal*, 83 Penn. St. 198.

In an action to recover back usurious interest, it appeared that the plaintiff had not in fact, nor had any one for him, in fact, paid any usurious interest, but he had given notes including usurious interest, which, however, were so held that the objection of usury was available in defense of them; and it was held that he could not recover. *Chaplin v. Currier*, 49 Vt. 48.

Where, after usury is paid, the entire debt is discharged by a novation, before any election on the part of the borrower to reclaim the usury paid, it will not be applied in discharge of the new debt, if limitation has barred the right to recover it. *Smith v. Young*, 11 Bush (Ky.), 393.

Where the payment of usurious interest was made upon process of execution, and there was no allegation of actual collusion to evade the statute, it was held not to be recoverable in a new suit; but that the remedy of the defendant was to apply to the court to open the judgment. *Federal Ins. Co. v. Robinson*, 82 Penn. St. 357.

§ 20. **Relief in equity.** A court of equity is clothed with power to decree a forfeiture, where usury appears, and it is bound in obedience to the statute to exercise it. *Chapman v. State*, 5 Oreg. 432; *Taylor v. Grant*, 3 J. & Sp. (N. Y.) 353. And the repeal of the usury laws does not affect the power of a court of equity to review and set aside usurious transactions where they are founded on fraud. *Howley v. Cook*, 8 Ir. R. Eq. 571.

In equity the rule has prevailed, when usury is relied upon as a defense, that it will only be allowed to the extent of the excess, beyond the legal rate. In that forum, such excess only is allowed to be relieved against, as the party seeking equity must do equity. *Mapps v. Sharpe*, 32 Ill. 13; *Spain v. Hamilton*, 1 Wall. (U. S.) 604. And this doctrine applies to the case of a person standing in the position of a claimant, through a bill in equity, of priority on a fund, another claimant upon which, as defendant, is the alleged usurer. The fact that the suit is a mere contest, between different parties, for a fund, and a contest, therefore, in which each claimant may, in some senses, be considered an actor, does not force the alleged usurer into the position of a complainant or plaintiff, and so expose him to the penalty incurred by a person seeking as plaintiff to recover a usurious debt, that is, expose him to the loss of the entire claim. *Id.*

Equity will not interfere to set aside an executed contract, on the ground of usury. And one to whom a note has been assigned with guaranty may enforce the note against the maker, even though the guaranty is void for usury. *Armstrong v. Gibson*, 31 Wis. 61; 11 Am. Rep. 599.

In Missouri and Illinois, a person who has paid unlawful interest upon an usurious contract cannot recover it back in equity. *Rutherford v. Williams*, 42 Mo. 18; *Pitts v. Cable*, 44 Ill. 103. Although after a transaction has been closed, usurious interest cannot be recovered back, yet while the transaction is yet open and the debt unpaid, a court

of chancery, in stating the account, will allow as a credit upon the principal whatever usurious interest may have been paid. *Parmelee v. Lawrence*, 44 Ill. 405.

If the maker of a note tainted with usury has been compelled to pay it to a *bona fide* indorser to whom it has been indorsed before maturity and without notice, such payment will be regarded as compulsory, and the maker, in a suit in equity against the payee and the indorsee, may, under the general prayer for relief, recover of the payee the usurious portion of the note. *Woodworth v. Huntoon*, 40 Ill. 131.

A promissory note was given in payment, in part, of a valid loan of money, and, in part, of an amount of usurious interest, exacted under another agreement, disconnected with the loan. It was held that the valid loan constituting part of the consideration of the note, not being affected by any suspicion of usury, was not discharged, and that the only relief to which the maker was entitled against the note was an abatement of so much of the amount thereof as was made up of the usurious interest. *Smith v. Heath*, 4 Daly (N. Y.), 123.

§ 21. **Exhausting remedy at law.** One who has a good defense at law to a usurious agreement or security cannot have relief in equity, unless the instrument is a cloud upon title to land, or some other necessity for the interposition of a court of equity is shown. *Allerton v. Belden*, 49 N. Y. (4 Sick.) 373.

§ 22. **Requiring plaintiff to do equity.** Equity will not entertain jurisdiction of a suit seeking relief against usurious contracts, unless the applicant tenders or offers to pay the principal and the legal rate of interest. *Tooke v. Newman*, 75 Ill. 215; *Eslara v. Elmore*, 50 Ala. 587; *Giveans v. McMurtry*, 1 Green (16 N. J. Eq.), 468. If a lender comes into equity seeking to enforce the contract, the court will give effect to the statute and declare the contract void. But if the borrower seeks relief against the contract, the court will prescribe the terms of its interference. *Vanderveer v. Holcomb*, 2 Green (17 N. J. Eq.), 87. But the doctrine that a party seeking affirmative relief in a court of equity against a usurious contract, either by way of original or cross petition, must first do equity, by tendering the amount due, exclusive of the usury, does not apply to a defendant acting strictly on the defensive. *Union Bank v. Bell*, 14 Ohio St. 200; *Newman v. Kershaw*, 10 Wis. 333.

Where a contract or obligation is given for two or more separate and independent objects, having no connection with each other, one of which is the security of a usurious debt, although the contract or obligation is altogether void, and no action at law or in equity could be

maintained thereon, nevertheless, if the party comes into a court of equity to ask that it be surrendered, all that the statutes of usury have done affecting the complainant's right to relief is to forbid that any payment on account of such usurious debt shall be made a condition of relief. *Williams v. Fitzhugh*, 37 N. Y. (10 Tiff.) 444.

§ 23. **Restrainin proceedings at law.** A person giving securities upon a usurious loan is entitled to an injunction restraining their prosecution. *Wheelock v. Lee*, 15 Abb. Pr. (N. S.) 24. See S. C. reversed, 64 N. Y. (19 Sick.) 242.

Usury in the terms of a loan, secured by mortgage, furnishes no ground for an injunction to restrain the sale of the mortgaged premises by the mortgagee, under a power in the mortgage, unless the mortgagor pays, or brings into court to be paid, the principal sum actually due, with legal interest thereon. *Powell v. Hopkins*, 38 Md. 1; *Hill v. Reifsnider*, 39 id. 429. And see *Rietz v. Foeste*, 30 Wis. 693.

When real estate is sold subject to a mortgage, and the purchaser agrees specifically to pay the mortgage according to its face, as part of the consideration, a court of equity will not, at the instance of the purchaser, enjoin the sale of the premises by the mortgagee, on the ground that the mortgage debt was usurious. *Hough v. Horsey*, 36 Md. 181; 11 Am. Rep. 484.

§ 24. **General issue.** In an action upon a civil contract, usury may be given in evidence under the general issue. *Williams v. Smith*, 65 No. Car. 87; *Cleaden v. Webb*, 4 Houst. (Del.) 473; *Cotton v. Lake*, 2 Mass. 540; *Solomons v. Jones*, 1 Treadw. Const. Rep. 144; *Fulton Bank v. Stafford*, 2 Wend. 483. But if, in an action brought on a specialty, the defendant would avoid the contract as usurious, he must set forth the matter in a special plea. *Hills v. Eliot*, 12 Mass. 26; *Pond v. Horne*, 65 No. Car. 84. This strictness, however, is applicable only to the original parties to the instrument. A subsequent purchaser of a title from a grantor who has already executed a conveyance to another, which by statute is void, is not obliged to plead this matter, but may give it in evidence. *Hills v. Eliot*, 12 Mass. 26.

Where a bill to foreclose a mortgage discloses a usurious contract, and the master computes the interest on the usurious basis, the question of usury may be presented by exceptions to the master's report, without having been raised by answer or plea. *Drake v. Latham*, 50 Ill. 270.

§ 25. **Special plea.** The defendant, who would avail himself of the defense of usury, in most cases must plead it specially. *Schoonhoven v. Pratt*, 25 Ill. 457; *Frank v. Morris*, 57 id. 138; 11 Am. Rep. 4; *New Jersey, etc., Co. v. Turner*, 1 McCarter (N. J.), 326; *Pilsbury v. McNally*, 22 Ark. 409; *Manning v. Tyler*, 21 N. Y. (7 Smith)

567; *Rock River Bank v. Sherwood*, 10 Wis. 230; *Weimer v. Shelton*, 7 Mo. 237; *Livingston v. Indianapolis Ins. Co.*, 6 Blackf. 133. And see *ante*, p. 628, § 17, and authorities cited. An objection that a bond is usurious cannot be taken by demurrer. *Langridge v. Cobb's Ex'rs*, 23 Ark. 549. But it is enough to allege the facts in the answer as they occurred, and if such facts justify the inference of a usurious contract, the answer, no demurrer having been interposed thereto, ought to be held sufficient. *Maule v. Crawford*, 14 Hun (N. Y.), 193. But an allegation that the plaintiff purchased the accommodation note in question at a usurious discount does not show usury; for the note may have passed to a third party at a legal rate of discount; and the plaintiff might have purchased from such third party. *Archer v. Shea*, 14 Hun (N. Y.), 493.

An agreement to withdraw the plea of usury is against public policy and cannot be enforced; but where a defendant, having once pleaded usury, withdraws the plea in consideration that the plaintiff will consent to a continuance, he ought not to be afterward allowed to amend by filing the same plea again. *Clark v. Spencer*, 14 Kans. 398; 19 Am. Rep. 96.

§ 26. **Replication.** A replication to a plea of usury must deny the existence of usury altogether in the transaction, or it must state specially the contract. *Richmond v. Wagon*, 5 Humph. 571; *Briggs v. Sholes*, 18 N. H. 513; *Waterman v. Haskin*, 7 Johns. 283; *Darling v. Homer*, 16 Mass. 288. A replication that "it was not usuriously agreed that more than legal interest should be received," is not a full denial of the plea, and therefore bad. *Wright v. Minter*, 2 Stew. 453.

It is no valid objection to the defense of usury that the mortgage sought to be foreclosed was given for a part of the purchase-money and not for a technical loan or lending of money. *Diercks v. Kennedy*, 1 Green (N. J.), 210.

The rule that an estoppel *in pais* may avail against the defense of usury is applicable in the case of representations made by the accommodation indorser of negotiable paper, that the note is valid business paper, as well as to such representations made by the maker. *Mason v. Anthony*, 3 Abb. (N. Y.) App. Dec. 207. See, also, *Dickson v. Vail*, 2 Cin. (Ohio) 103.

§ 27. **Amendments for setting up defense.** A decree will not be reversed on appeal and the case sent back, to enable the defendant to amend his pleadings by alleging that the contract was usurious by the laws of another State where it was made. *Campion v. Kille*, 2 McCarter (N. J.), 476.

§ 28. **Evidence.** The defense of usury being of a penal nature must be sustained by strict proof. *Frank v. Morris*, 57 Ill. 138; 11 Am. Rep. 4; *Griggs v. Howe*, 2 Abb. (N. Y.) App. Dec. 291; *Grant v. Merrill*, 36 Wis. 390; *Taylor v. Morris*, 22 N. J. Eq. 606. And see *Morris v. Taylor*, id. 438. Proof of a usurious agreement, excluding any other rational hypothesis, is essential to the defense of usury. *Gillette v. Ballard*, 25 N. J. Eq. 491; *Grant v. Merrill*, 36 Wis. 390; *Churchman v. Lewis*, 34 N. Y. (7 Tiff.) 444; *Ennor v. Welch*, 48 Ill. 353; *Hammond v. Smith*, 17 Vt. 231; *Barcalow v. Sanderson*, 2 Green (N. J.), 460. The burden of proof is on the party setting up the defense of usury. He must establish the facts necessary to constitute it beyond a reasonable doubt and by a clear preponderance of testimony. *Conover v. Van Mater*, 3 Green (N. J.), 481. *Haughwout v. Garrison*, 69 N. Y. (24 Sick.) 339. Proof of payment of usurious interest upon the note affords only presumptive evidence that a previous usurious agreement had been made; and the court, even if they presume that a usurious agreement was made, will not proceed further, and from that fact presume that such agreement was made when the money was loaned; and that testimony alone, unaccompanied by other circumstances, will not be submitted to the jury to weigh. *Hammond v. Smith*, 17 Vt. 231. And see *Shoop v. Clark*, 4 Abb. (N. Y.) App. Dec. 235; 1 Keyes, 181. Usury may be proved from extrinsic circumstances as well as from the face of the contract. *Scott v. Lloyd*, 9 Pet. 418; *Wetter v. Hardesty*, 16 Md. 11. And an express agreement for usury need not be proved, but may be inferred from facts which may have the appearance of a sale; and this is for the jury only. *Train v. Collins*, 2 Pick. 145. A contract reserving more than legal interest on its face, is *prima facie* evidence of usury; but this may be repelled by showing that more than legal interest was reserved by mistake, and contrary to the intent of the party. *Archibald v. Thomas*, 3 Cow. 284. But if the evidence on a plea of usury vary, either in the sum alleged to be usurious, or in the consideration stated in the plea, the variance will be fatal. *Smith v. Brush*, 8 Johns. 84. Where usury is alleged to be concealed under the form of exchange, evidence on both sides is admissible to show the rate of exchange. *Andrews v. Pond*, 13 Pet. 65. And where more than legal interest for the forbearance of money is intentionally taken, whether the party acts in ignorance of the law or not, it is conclusive evidence of a corrupt agreement within the statute, and the contract is void. *Bank of Salina v. Alword*, 31 N. Y. (4 Tiff.) 473.

It is no proof of usury, that the sum secured by a mortgage

exceeds that named in the consideration clause of the conveyance, together with accruing interest. *Vesey v. Ockington*, 16 N. H. 479. But where money is lent to one on consideration that he shall buy with it certain property of very much less value, this is evidence of usury to go to the jury. *Tarleton v. Emmons*, 17 N. H. 43.

Where usury is set up as a defense, proof of other usurious contracts on the plaintiff's part in loans effected at or about the time when the note in suit was executed, is not admissible, nor will a loan of money at the highest legal rate of interest sustain such a defense upon proof that one who acts solely as the agent of the borrower informs the lender before the loan is made, that he (such agent) is to receive, and that he does in fact receive a certain sum from the borrower, for his services in effecting the loan, where the lender does not participate in the compensation thus received. *Ottillie v. Waechter*, 33 Wis. 255. And see *Eagle Bank v. Rigney*, 33 N. Y. (6 Tiff.) 613. A requirement by an insurance company, on making a loan and taking a mortgage, that the borrower shall take out a policy of insurance as a condition of obtaining the loan, is not, of itself, evidence of a usurious agreement. *Washington Life Ins. Co. v. Paterson Silk Manuf. Co.*, 25 N. J. Eq. 160.

In an action upon a promissory note against the makers, the answer set up that the note was a mere accommodation note, and that when the plaintiff discounted it for the payee they exacted a usurious rate of interest, and that the note was therefore void. It was held that under this answer the defendants could not show that the note was void on account of their having taken usury from the payee on an exchange of the note in suit for one made by him to their order. *Taylor v. Jackson*, 5 Daly (N. Y.), 497.

A debt in good faith contracted in another State cannot be impeached for usury where it does not appear by any evidence that the interest taken is illegal in that State, or if it is, that the validity of the contract is affected by it. *Uhler v. Semple*, 20 N. J. Eq. (5 C. E. Gr.) 288; *Klinck v. Price*, 4 W. Va. 4; *McCraney v. Alden*, 46 Barb. (N. Y.) 272.

The mere fact that one who borrowed money from a building and loan association was a stockholder in such association, does not raise a conclusive presumption that there was no usury in the transaction. *Parker v. Fulton, etc., Assoc.*, 42 Ga. 451.

In an action on a promissory note, under a counter-claim for money had and received, proof of payment of usurious interest will not be received nor the same allowed, unless the defendant specifically alleges the

facts showing usury. *Martin v. Pugh*, 23 Wis. 184. The rule of evidence in civil actions is the proper rule in actions to recover back usury. *Wheatley v. Waldo*, 36 Vt. 237.

As to what evidence will sustain the defense of usury in an action to foreclose a mortgage, see *Estevez v. Purdy*, 66 N. Y. (21 Sick.) 446.

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